Petition

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81-2073
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MICHAEL G. THEVIS and
GLOBAL INDUSTRIES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT *

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* This case was decided by a panel of Unit B of the former Fifth Circuit.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, when a defendant makes a government witness unavailable, the witness' out of court statements are admissible regardless of whether they satisfy the reliability tests for hearsay under Rule 804 of the Federal Rules of Evidence.

2. Whether jury instructions which leave the admissibility of explosive hearsay evidence in the hands of the jury, and which require the jury to convict on one count in order to use that evidence in considering other counts, thereby generating an added incentive to convict on the first count, create an impermissibly serious doubt about the accuracy of the fact-finding process.

3. Whether, as a matter of due process, a trial court has inherent authority to order immunity for a crucial defense witness who will otherwise invoke his fifth amendment privilege and withhold his testimony.

LIST OF PARTIES

United States of America
Michael G. Thevis
Anna Jeannette Evans
Alton Bart Hood
Global Industries, Inc.

STATEMENT PURSUANT TO RULE 28.1 OF THE RULES OF THE SUPREME COURT

Petitioner Global Industries, Inc. is now an inactive corporation. Fidelity Equipment Leasing Company, once the parent of Global, is also inactive.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS DELIVERED BELOW

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[1] Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

JURISDICTION

Petitioners seek review of a judgment of the former Fifth Circuit Court of Appeals dated January 11, 1982. Rehearing and rehearing *en banc* were denied by orders dated March 3, 1982. On March 25, 1982, Circuit Judge Kravitch granted a motion by defendant Anna Jeanette Evans to stay the mandate pending filing and determination of a petition for certiorari in this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article VI of Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . .

Article V of Amendments to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Rule 802 of the Federal Rules of Evidence:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804 of the Federal Rules of Evidence:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
>
> . . . .
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity . . .

. . . .

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or

to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party

sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Petitioner Michael G. Thevis was convicted on Counts One, Two and Ten of a ten-count indictment in the United States District Court for the Northern District of Georgia. Global Industries, Inc. was convicted on Counts One and Two. It was not charged in Count Ten.

Count One alleged that Thevis, Global and others committed acts of racketeering in the course of conducting an enterprise, in violation of 18 U.S.C. § 1962(c). Count Two alleged that they conspired to do so, in violation of 18 U.S.C. § 1962(d). Count Ten alleged that Thevis, along with Anna Jeanette Evans and Alton Bart Hood, conspired in violation of 18 U.S.C. § 241 to deprive Roger Dean Underhill of his right to be a witness in grand jury and trial proceedings against Thevis and that the conspiracy resulted in the death of Underhill and another.[2]

A panel of the former Fifth Circuit Court of Appeals affirmed the convictions on January 11, 1982. The panel denied rehearing and the court denied rehearing *en banc* by orders dated March 3, 1982.

The indictment upon which petitioners were tried superseded an earlier indictment. The first indictment was dismissed upon the government's motion. The second indictment, filed after Underhill's murder, eliminated some of the defendants originally charged and added

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[2] Evans and Hood were also convicted and their convictions were affirmed. They have each filed a petition for certiorari with this court.

allegations that Thevis killed Underhill. The Underhill murder was included both as an act of racketeering in Counts One and Two and as the substance of Count Ten.

The substance of the RICO charges in Counts One and Two was that Thevis, Global and others committed acts of racketeering to advance and protect an association in fact organized to operate a pornography business through unlawful means. The acts of racketeering consisted of the murder of two Thevis competitors, Kenneth Hanna and James Mayes, the arson of two buildings belonging to other competitors, and the murder of Underhill to silence him.

Roger Underhill had been a Thevis employee and protegee until he became disaffected. He claimed to be a witness to or a participant in the Hanna and Mayes murders as well as the arsons. The trial court correctly observed that he was the "chief architect" of the prosecution.[3] He was expected to be its key witness.

Underhill began cooperating with federal agents in January 1977 while on furlough from prison on unrelated charges. He was then no longer employed by Thevis, and was disaffected. He had in fact filed an action against Thevis seeking treble damages under the civil provisions of RICO, 18 U.S.C. § 1964.

When Underhill agreed to cooperate, he was granted immunity. He then underwent a series of interviews, three days of which were tape-recorded and transcribed. He reiterated relevant portions of his interviews before a federal grand jury. The first indictment was returned on June 10, 1978. At that time Thevis was a fugitive, having escaped from federal custody on obscenity charges. At the time of his escape he was being held in an Indiana county jail to assure his availability for civil proceedings concerning one of the arsons.

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[3] *United States v. Thevis*, 84 F.R.D. 57, 70 (N.D.Ga. 1979).

Underhill was killed by gunshots on October 25, 1978, as he was showing property to a potential purchaser. The potential purchaser was also killed. Thevis remained a fugitive until November 9, 1978 when he was arrested in Bloomfield, Connecticut, in the company of Jeanette Evans. When arrested, Thevis had a copy of the transcript of Underhill's F.B.I. interviews in his possession. That transcript was to assume major significance in the trial on the superseding indictment.

The government presented its case in two phases. It proceeded first with its proof on Count Ten of the indictment, the Underhill murder conspiracy. In its proof on that count, the government was permitted, over objection, to introduce the entire transcript of Underhill's conversations with the F.B.I.

The court permitted the jury to read the entire transcript even though most of it did not concern the charges in the indictment. In his conversations with the agents, Underhill had ranged well beyond the specific acts of racketeering which would become the original RICO charges. He painted a detailed picture of Thevis as a systematic law violator, thief, and philanderer. According to Underhill, Thevis plotted thirteen separate murders and committed numerous assaults, acts of terror, arsons, and bombings. He said that Thevis was a petty thief, an extortionist, a defrauder and a corrupter of government officials. He repeatedly volunteered his opinion that Thevis had Mafia connections, dealt in "hard core pornography," "messed around" with female office workers, "kept" one woman for years, and procured an abortion for another. According to Underhill, Thevis' lawyer described him as a "pathological liar."

The district court instructed the jury that the exhibit was admitted not for its truth but only as it bore on the motive of any individual who had knowledge of it.[4]

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[4] *United States v. Thevis*, 665 F.2d 616, 634 (5th Cir. 1982).

The government then completed its proof on Count Ten and proceeded to Counts One and Two.

In its proof of the RICO charges, the government offered selected portions of the transcripts, as well as Underhill's grand jury testimony. The court held that this evidence, although concededly hearsay, was admissible for its truth under Rule 804(b)(5) of the Rules of Evidence. It found that Underhill's conversations and grand jury testimony possessed the required indicia of reliability for admission under that rule.[5]

It also held that, notwithstanding compliance with Rule 804(b)(5), admission of the evidence would violate petitioners' rights to confrontation under the sixth amendment, unless the government established by clear and convincing evidence that Thevis had waived that right. It found such a waiver based upon the government's proof on Count Ten.[6] It instructed the jury that they might consider the selected portions of the transcript for their truth, notwithstanding the earlier instructions to consider the entire transcript only on the issue of motive. In its final instructions, it ordered the jury not to consider the Underhill hearsay unless it found Thevis guilty on Count Ten.[7]

Prior to trial, petitioners filed a motion requesting the court to order George Thevis, father of Michael Thevis, to testify under court ordered immunity. Petitioners proffered, *in camera* and *ex parte*, that George Thevis would testify that, on the date and at the time of the Underhill murder, he was with Thevis and Hood at a motel in Atlanta, Georgia. The elder Thevis refused to testify because of potential prosecution for "harboring" his son, who was then an escaped prisoner. The trial court denied this request.

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[5] *Id.* at 627.

[6] *Id.*

[7] *Id.* at 647.

Petitioners urged a number of errors on appeal. Principally, they argued that the district court erred in admitting selected portions of Underhill's F.B.I. interviews and his grand jury testimony as substantive evidence on Counts One and Two and in permitting the jury to receive the entire transcript and to read the multitude of allegations by Underhill about Thevis, all unrelated to the charges at trial.

The court of appeals affirmed the district court's admission of the exhibit in its entirety as an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence.[8] It held that the trial court's limiting instructions were "easily understandable to the jury," and that the probative value of the exhibit was at least as strong as the "potential for unfair prejudice."[9]

With regard to the admission of selected portions of the Underhill F.B.I. conversations and his grand jury testimony, the court of appeals found it unnecessary to review the district court's determination that they possessed that exceptional reliability necessary for admission under Rule 804(b)(5). It held that where the evidence demonstrated that a defendant had made a witness unavailable for trial, the defendant waived not only his rights to confrontation under the sixth amendment but also his right to challenge admission of the evidence under the hearsay rules.[10]

The court of appeals found no error in the district court's refusal to grant use immunity to the defense witness.[11]

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[8] *Id.* at 634-35.

[9] *Id.*

[10] *Id.* at 627-33.

[11] *Id.* at 638-41.

REASONS FOR ALLOWING THE WRIT

I. There Is a Division in the Circuits as to Whether, When a Defendant Makes a Government Witness Unavailable, the Federal Rules of Evidence Have No Application to the Admissibility of the Witness' Out-of-Court Statements.

Three circuits have now dealt directly with the admissibility of hearsay from a declarant made unavailable by acts of a party. Review of those decisions and commentary on them discloses widening disagreement. There is obvious confusion as to whether the rule governing statements by unavailable declarants, Rule 804 of the Federal Rules of Evidence, applies at all when a party has made a witness against him unavailable. The Tenth Circuit in *United States v. Balano*[12] and the Fifth Circuit in this case[13] hold that making a witness unavailable waives the right to confrontation and the right to object on hearsay grounds, thus eliminating the need to make any additional determination of reliability as would be required by Rule 804. On the other hand, in *United States v. Carlson*[14] the Eighth Circuit required compliance with the reliability requirement of the rule *and* a waiver of confrontation rights. This Court should grant the writ to resolve this issue.

Petitioners demonstrate below that the *Balano-Thevis* rule is incorrect and that hearsay from an unavailable declarant must always be tested under Rule 804. If this Court agrees, it should then undertake to resolve the increasingly disparate readings of that subsection of the rule most frequently invoked for unavailable government

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[12] 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).

[13] *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982).

[14] 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). The district court in this case followed *Carlson* in its two-step procedure.

witnesses—subsection (b)(5). The decisions are divided on whether and, if so when, the out-of-court testimony of an immunized or cooperating witness can satisfy the "equivalent circumstantial guarantees of trustworthiness" required by the rule. The Fourth and Eighth Circuits have construed the rule to admit grand jury testimony of an immunized witness.[15] The Fifth Circuit has expressed serious reservations as to whether such testimony ever meets the necessary guarantees of trustworthiness.[16] The Third Circuit seems to agree with the Fifth.[17]

Prior to adoption of the Federal Rules of evidence, the Second Circuit held that use of grand jury testimony violated both the hearsay rule and the Confrontation Clause.[18]

This is an appropriate case to resolve both the conflict between *Balano* and *Carlson* and the disarray in the circuits concerning the rigor of the reliability requirement in Rule 804(b)(5). In this case, the declarant was an admitted perjurer who had, at different times, told different stories incriminating different people to various law enforcement officers. For the F.B.I. interviews, he was unsworn. He had financial incentives[19]

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[15] *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 941 (1977).

[16] *Thevis*, 665 F.2d at 629; *see also United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1978); *United States v. Gonzales*, 559 F.2d 1278 (5th Cir. 1977).

[17] *United States v. Bailey*, 581 F.2d 341, 345 n.4 (3d Cir. 1978); *see also United States v. Turner*, 475 F. Supp. 194, 198 (E.D. Mich. 1978); *United States v. Garner*, 439 U.S. 936 (1978) (opinion of Justices Stewart and Marshall dissenting from denial of certiorari).

[18] *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971).

[19] Underhill had filed a $5 million civil RICO action against petitioner. Conviction of petitioner on criminal RICO charges

and was under pressure from federal agents to incriminate Thevis. There was also evidence that he suffered from paranoid schizophrenia. In a previous case his counsel had sought to defend on the ground of insanity.[20]

The district court noted Underhill's history of perjury, his motives to lie, and the "darker nature of his character."[21] It even remarked that Underhill did not "appear to have great respect for the truth when it did not serve his purposes."[22] It held, nevertheless, that the sanctions for lying, perjury and loss of immunity, as well as corroboration of some aspects of his testimony, guaranteed its trustworthiness.

Not surprisingly, the court of appeals chose not to deal with the district court's endorsement of Underhill's reliability. Embracing the *Balano* rule, it avoided the inquiry altogether. That holding was error.

The *Balano* rule has been sharply and correctly criticized by the leading commentator on the Federal Rules of Evidence.[23] It is nevertheless seductive because, in a simple way, it insures that a defendant who procures the absence of a witness will not profit from his wrongdoing. Its salutary impulse obscures the need for a more careful analysis of the relationship between the rule against hearsay and the Confrontation Clause than the Tenth and Fifth Circuits undertook, however. Those courts fail to account for the different interests protected

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would have been of enormous benefit to Underhill as petitioner would have been estopped from denying the predicate acts in the civil case. 18 U.S.C. § 1964.

[20] See the district court's discussion of Underhill's reliability in *United States v. Thevis*, 84 F.R.D. 57, 64-65 (N.D.Ga. 1979).

[21] *Id.* at 64.

[22] *Id.*

[23] 4 Weinstein's *Evidence*, Cumulative Supplement 204 (December 1981).

by the two principles and for the different consequences to a trial when they are not applied. Unless corrected, the *Balano-Thevis* rule will produce mischief far out of proportion to the evil at which it is directed.

The *Balano-Thevis* rule provides that once the government proves a defendant made a witness unavailable, the witness' hearsay testimony, in whatever form, is admissible regardless of its reliability.[24] Those courts apparently are prepared to accept the consequences to the fact-finding process from evidence heretofore too unreliable to be considered.

This is a startling development in the jurisprudence of this country. Neither this Court which drafted the Rules of Evidence nor the Congress which enacted them intended or approved such a principle. Rule 804 admits hearsay when declarants are unavailable, by reason of death, intimidation, or otherwise, but it does so under enumerated and limited conditions designed to insure reliability. It does not permit the court to disregard those conditions when the opponent of the evidence caused the witness' absence. To the contrary, the drafters made it clear, in Rule 802, that the listed exceptions were exclusive:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court . . . .

The Senate Judiciary Committee explained that Rule 802 expressed Congress' clear intent.

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[24] According to the *Thevis* court, the trial court may inquire into its reliability only to determine that it is not so "totally unreliable" as to offend due process. 665 F.2d at 633. Further definition of "totally unreliable" does not appear, but short of the obvious ravings of a madman, very little is "totally unreliable." Because the panel explicitly intends to eliminate the reliability inquiry of the rule, it presumably did not intend to revive it by the language in note 17.

> [T]he Congress must ensure that the (evidence) rule-making process is not delegated to the unbridled discretion of the courts—not because of any distrust of the courts but because of the dictates of sound government.[25]

The court of appeals concluded that, Rule 802 notwithstanding, its one-step waiver analysis is justified by the "similarity of interests" underlying the Confrontation Clause and the rule against hearsay. A similarity of interest no doubt exists between these rules, for both contribute ultimately to the integrity of the fact-finding process.[26] The values protected are, however, quite different.

The Confrontation Clause insures the right of one placed on trial to require witnesses literally "to confront" him and the jury. This right "forms the core of the values" furthered by the Clause.[27] In *Mattox v. United States* [28] the Court wrote that the Clause envisions

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Confrontation contributes to the integrity of the fact-finding process, but only as a consequence of securing to the accused the right to compel his accuser to give his evidence in full view of the jury and defendant. A de-

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[25] S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7079.

[26] *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), *quoting Berger v. California*, 393 U.S. 314, 315 (1969).

[27] *California v. Green*, 399 U.S. 149, 157 (1970).

[28] 156 U.S. 237, 242-243 (1895).

fendant can, therefore, knowingly and intelligently waive this right, by absenting himself from the trial [29] or, after warnings, by obstructing the proceedings so as to require his physical removal from the courtroom.[30]

The personal right of a defendant to confront his accuser is waivable by knowing conduct which makes it obviously impossible. It is a different thing altogether to say that unreliable evidence becomes admissible by reason of the defendant's misconduct prior to trial.

This Court has repeatedly observed that the "overlap" between the Clause and the hearsay rule is not complete.[31] Indeed, evidence may offend the hearsay rule but not the Confrontation Clause.[32] In short, the defendant has personal confrontation interests distinct from the judicial interest in excluding evidence so unreliable that it infects the integrity of the fact-finding process. The *Balano-Thevis* rule fails to recognize that distinction.

That rule too easily equates the defendant's personal right to confront with the trial court's duty to examine hearsay under the strictures of Rule 804. Proponents of this rule may assume that a defendant who intimidates a witness implicitly admits the truth of the declarant's statements and that bypassing the hearsay rule does no harm to the integrity of the fact-finding process, or they may feel that an erroneous verdict is an appropriate penalty for the misconduct. Neither is acceptable policy. The variety of human conduct suggests that it is not only

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[29] *Taylor v. United States*, 414 U.S. 17 (1973).

[30] *Illinois v. Allen*, 397 U.S. 337 (1970).

[31] *California v. Green*, 399 U.S. 149, 155 (1970); *see also Chambers v. Mississippi*, 410 U.S. 284 (1973).

[32] *United States v. Pacelli*, 470 F.2d 67, 69-70 (2d Cir. 1972), *cert. denied* 410 U.S. 983 (1973).

the guilty who intimidate witnesses[33] and that it is not only truthful witnesses who claim to be intimidated.

The inquiry into a defendant's guilt on underlying charges is separate and must be separated from prosecution for making witnesses unavailable. Defendants who engage in such conduct certainly should not profit from it. But society has sanctions for murder and obstruction of justice. The same evidence which supports the findings of waiver will support prosecution for serious crime. Fears that the guilty will go free are unwarranted.

II. The Court of Appeals' Approval of an Instruction That the Jury Could Convict Thevis on Counts One and Two Only If It Found Him Guilty on Count Ten Is Directly Contrary to Controlling Decisions of This Court.

In the preceding section, petitioners demonstrated that the court of appeals' treatment of the relationship between the Confrontation Clause and the rule of evidence designed to insure reliability in the fact-finding process was misguided. In this section, petitioners seek review of the court of appeals' approval of the manner in which the trial court submitted the Underhill hearsay to the jury. As will be clear, that procedure constituted plain error.

In its final instructions, the trial court told the jury to first consider Count Ten, the Underhill-Galanti murder count; then, if they found Thevis guilty of that count, they could consider Underhill's 302's and his grand jury statements for their truth as to Counts One and Two, the RICO counts.[34] On appeal petitioners argued that this instruction was plain error because it gave the jury

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[33] Consider the defendant who, outraged at false charges made against him, kills the witness. Society has no interest in convicting him on the false charges but a legitimate and strong interest in prosecuting him for murder.

[34] *Thevis*, 665 F.2d at 647.

an artificial incentive to convict on Count Ten.[35] "It created the irreparable danger that the jury would be coerced into convicting appellants on Count Ten and would do so using the very evidence whose admissibility it was to decide." [36]

In order for the jury legitimately to use the Underhill statements substantively for their truth, the instructions required that they make a putatively independent determination of guilt on Count Ten. In fact, though, it was a practical impossibiilty for the jury to ignore their substance in this context, for they had been told at many points throughout the trial that the same statements were admissible,[37] at least conditionally, for both their turth and as evidence of motive. And, recognizing that the statements were crucial to all counts, the jury was subject to a "natural and potent pressure" to arrive at a resolution permitting them free use of the substance of those statements.[38]

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[35] *Id.* The Court of Appeals noted correctly that the defendants requested this instruction. But as explained in Joint Reply Brief of Appellants at 6, "[S]ince the trial court had repeatedly denied their motions to sever count ten . . . , the instruction was the only remaining alternative that might diffuse the devastating prejudice that the defendants were subjected to as a result of the trial of count ten together with counts one and two . . . . That the defendants requested this instruction evidences nothing more than a final, albeit unsuccessful, attempt to protect their fundamental right to a fair trial."

[36] Joint Brief of Appellants at 79.

[37] By the time the jury received its final instructions it had become intimately familiar with the contents of the Underhill hearsay since it had earlier been admitted in whole on the question whether Thevis, Evans and Hood had a motive to kill Underhill. Excerpts had been admitted also as proof on Counts One and Two, but the jury was told that it should disregard the excerpts admitted on these counts if it was unconvinced that Thevis was guilty of the Count Ten conspiracy to murder Underhill. *Thevis*, 665 F.2d at 647-648.

[38] *Jackson v. Denno*, 378 U.S. 368, 382 (1964). In *Jackson v. Denno*, a New York procedure which required the court to receive

In effect, the ultimate determination of the admissibility of the Underhill material was left in the hands of the jury. Since the adoption of Rule 104,[39] Fed. R. Evid., however, the federal courts have recognized that the jury should have no role in deciding the admissibility of evidence.[40] It is precisely because the jury is unable to resist the substance of a piece of testimony in judging its admissibility that this function must be reserved for the judge.[41] Leaving the question of admissibility of obviously relevant evidence to the jury "endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally." [42]

Moreover, in this case, without the Underhill statements

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a defendant's confession and leave to the jury the ultimate determination of its voluntariness was found constitutionally deficient because the jury's decision on voluntariness, and hence admissibility, would not be uninfluenced by their impression of the truth or falsity of the confession. 378 U.S. at 379. The procedure, therefore, "did not afford a reliable determination" of the threshold question of admissibility. *Id.* at 377. In like fashion, in this case the more impressed were the jurors by the apparent truthfulness of the Underhill statements, and the more obvious it was to them that the substantive admissibility of these statements was essential to conviction, the more likely were they to succumb to the "natural and potent pressure" to make the finding (*i.e.*, guilt on Count Ten) necessary for admissibility. *Id.* at 382.

[39] Rule 104 states that "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court. . ."

[40] *E.g., United States v. James*, 590 F.2d 575, 580 (5th Cir. 1979) (en banc) (holding admissibility of coconspirator declarations to be determined by judge alone).

[41] *See Jackson v. Denno*, 378 U.S. 368.

[42] *James*, 590 F.2d at 579.

> the evidence of Thevis' guilt on counts one and two was flimsy, to say the least. Thus, even if the jury wanted to convict Thevis on counts one and two, it could not do so unless it found him guilty on count ten. It faced an all or nothing deliberation.[43]

The instructions requiring the jury to render a guilty verdict on the murder conspiracy count as a predicate to use of the irresistibly macabre contents of the Underhill hearsay in their consideration of the other counts generated a natural, but gravely prejudicial, pressure to convict on Count Ten or else allow the defendant Thevis to go unpunished. When, as here, jury instructions, by virtue of their own internal logic, naturally propel the jury's deliberative processes in one direction, the reliability of the entire fact-finding process is cast into question. Recent decisions of this Court manifest its recognition of the need to "look carefully at the verdicts submitted to the jury and the instructions given by the trial judge to insure that there is not an impermissibly serious doubt about the accuracy of the fact-finding process." [44]

Reliability of the fact-finding process is, without question, the central goal of the adversarial system of criminal justice. This Court has "repeatedly indicated that it will not tolerate any procedure or occurrence that seriously threatens the integrity of the fact-finding process. The function of legal process, the Court has written, is to minimize the risk of erroneous decisions. Where there is actual danger that the jury would convict on the basis of extraneous considerations, failure to provide safe-

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[43] Joint Brief of Appellants at 80. The Court of Appeals dismissed this argument as "highly speculative." *Thevis*, 665 F.2d at 647.

[44] Remington, [*Foreword* to student notes on *Sandstrom v. Montana* and *Beck v. Alabama*], 1981 WIS. L. REV. 513 (1981).

guards to minimize that danger violates due process." [45] These concerns were the main impetus behind the Court's holding in *Beck v. Alabama*,[46] and the rationale which controlled there may be transposed directly to the case at hand. In *Beck*, an Alabama statute prohibited the judge from instructing the jury on lesser included offenses in a capital case. This statutorily imposed all-or-nothing choice necessarily injected "extraneous factors," "diverting the jury's attention from the central issue of whether the state has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty," and thereby introduced an intolerable "level of uncertainty and unreliability into the fact-finding process." [47]

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[45] Note, *Beck v. Alabama: The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560, 576 (1981) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979) and *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978)). In the same passage, the author discusses other decisions in which the Court's holdings were explicitly tied to its "desire to promote the integrity of the fact-finding process," including *Chambers v. Mississippi*, 410 U.S. 284 (1973) (invalidating operation of state evidentiary rule when defendant prohibited thereby from presenting crucial exculpatory testimony); *Estelle v. Williams*, 425 U.S. 501 (1976) (defendant cannot be compelled to stand trial in prison garb); *Patterson v. New York*, 432 U.S. 197 (1977) (state may not shift burden of persuasion to defendant); *Morissette v. United States*, 342 U.S. 246 (1952) (prosecution may not prove its case through conclusive presumptions); *Jackson v. Virginia*, 443 U.S. 307 (1979) (claims regarding insufficiency of evidence cognizable on federal habeas corpus).

[46] 447 U.S. 625 (1980).

[47] *Beck*, 447 U.S. at 642-43. The heart of the Court's reasoning was that the Alabama procedure was constitutionally defective because

> it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third

In the present case, the instructions to the jury affected their deliberations in directly comparable fashion. The jury's understanding of the extraneous consequences of its verdict on Count Ten could not help but divert its attention from the central issue of proof beyond a reasonable doubt on that charge. Without a conviction on Count Ten, the irresistible contents of the Underhill statements could not be accepted; without a conviction on Count Ten, the jury knew, there would be no punishment for the defendants on any charge.

The jury instructions in this case are thoroughly suffused with the constitutional evils identified by this Court in *Jackson v. Denno* and *Beck v. Alabama*. Given the burden on trial courts to safeguard fundamental fairness in the face of ever more complex prosecutions under RICO, a statute which seems, by its very nature, destined to add complications to every aspect of the trial process, this Court should grant review of this case in order to provide the lower courts guidance on the proper management of jury deliberations in complex cases through constitutionally sound instructions.

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option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. In any particular case those two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainity and unreliability into the fact-finding process that cannot be tolerated in a capital case.

Id. See generally, Note, *Beck v. Alabama: The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560 (1981) (arguing that the rationale of *Beck* extends as well to non-capital cases).

III. Whether a District Court Has Authority to Confer Judicial Use Immunity Upon a Defense Witness Is an Issue About Which the Circuit Courts Disagree and Should Be Settled by This Court.

Prior to trial petitioners filed a motion requesting that the court provide "judicial use immunity" [48] for George Thevis, the father of defendant Michael Thevis. The testimony of George Thevis was vital to the defense because it would have provided a first-hand account of the actual whereabouts of Michael Thevis and Alton Hood at the time they were allegedly carrying out the murders of Underhill and Galanti.[49] Without George Thevis' testimony, the defendants' alibi defense was severely undercut.

The pre-trial motion for judicial use immunity for George Thevis was reviewed during trial, *in camera* and *ex parte*, with attorneys for the witness present. The defense made a proffer of George Thevis' expected testimony and again advised the court that he would invoke the fifth amendment privilege if called to testify. The trial court rejected the defense request, holding "that it lacked authority to grant immunity to any witness." [50]

On appeal petitioners argued, principally on the authority of *Government of the Virgin Islands v. Smith* [51] and on Supreme Court precedents relied on by the Third Circuit in that case,[52] that a trial court does have inherent authority, founded upon the due process right to a

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[48] *United States v. Thevis*, 665 F.2d at 638.

[49] Brief of Global Industries at 22-24.

[50] *United States v. Thevis*, 665 F.2d at 638.

[51] 615 F.2d 964 (3d Cir. 1980).

[52] *E.g., Chambers v. Mississippi*, 410 U.S. 284 (1973); *Simmons v. United States*, 390 U.S. 377 (1968); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); *Brady v. Maryland*, 373 U.S. 83 (1963).

fair trial, to confer use immunity upon a witness with essential exculpatory information.[53] They argued further that the conditions established in *Smith* for the granting of judicial use immunity were all met in the present instance.[54]

The Fifth Circuit panel, after noting the "widely divergent opinions" of the circuit courts on the question of judicially conferred defense witness immunity and the lack of any Supreme Court decision specifically addressing the matter, rejected petitioners' due process argument.[55] The panel concluded that "district courts may not grant immunity to defense witnesses simply because that witness has essential exculpatory information unavailable from other sources."[56]

In so holding, the court firmly aligned itself with the Second Circuit's views in *United States v. Turkish*.[57] The *Turkish* opinion was a specific rejoinder to *Smith*, setting forth the bases for the Second Circuit's "fundamental disagreement with the standards outlined in that decision."[58] *Turkish* considered and rejected arguments for defense witness immunity based on both the sixth amendment's Compulsory Process Clause and the fifth amendment's Due Process Clause. The *Thevis* appeal concerned only due process arguments for defense witness immunity,[59] but the newly constituted Fifth Circuit has recently, in *United States v. Chagra*,[60] held not only

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[53] Brief of Global Industries at 16-22.

[54] *Id.* at 21-28.

[55] *Thevis*, 665 F.2d at 639.

[56] *Id.*

[57] 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

[58] *Id.* at 777.

[59] 665 F.2d at 638 n.23.

[60] 669 F.2d 241 (5th Cir. 1982).

that the due process argument is foreclosed in that circuit by *Thevis*, but also that the compulsory process clause cannot provide an alternative basis for judicially conferred immunity.[61]

The cases mentioned herein are but the most recent chapter in the long-standing controversy over the availability of defense witness immunity.[62] The question has attracted an extraordinary amount of attention from commentators, almost all of whom have argued that a right to defense witness immunity inheres in current

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[61] *Id.* at 259-60.

[62] *See also, United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980), *remanding United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979) for reconsideration in light of *Turkish*; *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. D'Apice*, 664 F.2d 75 (5th Cir. 1981); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *Grochulski v. Henderson*, 637 F.2d 50 (2d Cir. 1980), *cert. denied*, 450 U.S. 927 (1981); *United States v. Davis*, 623 F.2d 188 (1st Cir. 1980); *United States v. Praetorious*, 622 F.2d 1054 (2d Cir. 1980), *cert. denied*, 447 U.S. 869 (1980); *United States v. Lenz*, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 431 *United States* 970 (1978); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. Lang*, 589 F.2d 92 (2d Cir. 1978); *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978); *United States v. Housand*, 550 F.2d 818 (2d Cir. 1977), *cert. denied*, 431 U.S. 970 (1978); *In re Daley*, 549 F.2d 469 (7th Cir. 1977); *United States v. Graham*, 548 F.2d 1302 (8th Cir. 1977); *United States v. Smith*, 542 F.2d 711 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *Thompson v. Garrison*, 516 F.2d 986 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974); *United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *Cerda v. United States*, 488 F.2d 720 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

concepts of due process or may be derived from the Compulsory Process Clause.[63] The diversity of views amongst the circuits creates the potential for serious anomalies in the administration of justice.

At present, a matter so essential to the truth-finding process as a defendant's ability to compel testimony by witnesses may turn upon which circuit happens to have jurisdiction of his case. It is easy to imagine opposite results in factually indistinguishable cases simply because in one case immunized exculpatory testimony was admitted, while in the other it was not. The present case provides this court an ideal opportunity to resolve the controversy and to provide authoritative guidance as to whether or when due process requires that use immunity be conferred upon a defense witness.

For the foregoing reasons, the writ should issue.

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[63] *See, e.g.*, Mikkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 MERCER L. REV. 689 (1980), Note, *The Due Process Right to the Immunization of Defense Witnesses*, 22 B.C.L. REV. 299 (1981); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Note, *Judicial Immunity for Criminal Defense Witnesses: A Safeguard for the Defendant's Sixth Amendment Right to Compulsory Process*, 16 NEW ENG. L. REV. 481 (1981), Note, *Defense Witness Immunity: A Growing Controversy—Government of Virgin Islands v. Smith*, 53 TEMPLE L.Q. 1170 (1980); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967); Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); Note, *"The Public has a Claim to Every Man's Evidence": Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); *but see*, Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW, 447 (1981) (arguing that defense witness immunity cannot be justified on the basis of due process or the Compulsory Process Clause).

CONCLUSION

For all of the above reasons, petitioners request that the writ of certiorari be granted.

Respectfully submitted,

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May 10, 1982

Appendix

81-2073

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MICHAEL G. THEVIS and
GLOBAL INDUSTRIES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

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Clerk

Tel. 404-221-6187
FTS-242-6187
56 Forsyth St. N.W.
Atlanta, Georgia 30303

March 03, 1982

TO ALL PARTIES BELOW:

No. 79-5739

U.S.A.

v.

MICHAEL G. THEVIS, ET AL.

(Dist. Ct. No. CR-78-180-A)

This is to advise that an order has this day been entered denying the petition(s) for rehearing.

☐ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition() for rehearing en banc has also been denied.

☒ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition(s) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

NORMAN E. ZOLLER
Clerk

By: /s/ Angela L. Bickers
Deputy Clerk

cc: Mr. Bobby Lee Cook
Mr. William W. Taylor, III
Mr. Edward T. M. Garland
Mr. Steven H. Sadow
Mr. William Ralph Hill, Jr.
Mr. Edward E. Strain, II
Ms. Dorothy Y. Kirkley
Mr. Craig A. Gillen

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

No. 79-5739

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

MICHAEL G. THEVIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion January 11, 1982,
5 Cir., 197—, —— F.2d ——)

(Mar. 3, 1982)

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges; ** THOMAS, Judge.

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* Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1980).

** Honorable Daniel H. Thomas, Senior District Judge, sitting by designation.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Kravitch
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 79-5739

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLOBAL INDUSTRIES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING

(Mar. 3, 1982)

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges; ** THOMAS, Judge

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* Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1980).

** Honorable Daniel H. Thomas, Senior District Judge, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [Illegible] Kravitch
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT *
UNIT B

No. 79-5739

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL G. THEVIS, ALTON BART HOOD,
GLOBAL INDUSTRIES, INC., ANNA JEANETTE EVANS,
Defendants-Appellants.

Jan. 11, 1982

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges, and THOMAS **, Senior District Judge.

KRAVITCH, Circuit Judge.

Appellants Michael Thevis and Global Industries, Inc. [Global] were convicted by a jury of violating the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. § 1962. Thevis and appellants Anna Jeanette Evans and Alton Bart Hood were convicted of conspiracy to violate the civil rights of Roger Dean Underhill under 18 U.S.C. § 241 by preventing him from testifying at trial. All appellants claim that the trial court erred in several evidentiary rulings, chiefly objecting to the trial

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

** The Honorable Daniel H. Thomas, Senior District Judge for the Southern District of Alabama, sitting by designation.

court's admission of Underhill's grand jury testimony as a hearsay exception under Fed.R.Evid. 804(b)(5) and the trial court's refusal to grant judicial use immunity to defense witness George Thevis. Appellants also claim that the trial court misconstrued RICO and incorrectly charged the jury; and appellants Thevis, Evans and Hood argue that the conspiracy charged under 18 U.S.C. § 241 is not a crime. Finally, appellants Evans and Hood claim their trials should have been severed, and the evidence was insufficient to convict them of the conspiracy. For the reasons stated below, we affirm the convictions of all defendants.

I. Background

The original indictment in this case, filed on June 10, 1978, named Michael G. Thevis, Global Industries, Inc., Fidelity Equipment Leasing Corporation and eight other individuals as defendants. The central allegation was that Thevis and the corporations had conducted an interstate pornography business through a pattern of racketeering activity. Roger Dean Underhill, a principal witness before the grand jury, was named as an unindicted co-conspirator. On October 25, 1979, the grand jury returned a superseding indictment which added a charge that Thevis, Jeanette Evans and Bart Hood conspired to murder Underhill in order to prevent his testimony. Seven of the original defendants were not reindicted and their cases were dismissed. Only Counts One, Two and Ten of the indictment are relevant to this appeal.[1] Count One alleged a substantive RICO violation and Count Two alleged conspiracy to violate RICO.[2] Count Ten,

[1] The court granted Fidelity's motions for acquittal on all counts, and also granted motions for acquittal by all defendants as to Counts Three through Nine. William Ross Mahar, a Thevis associate who also was named in the superseding indictment, died during trial, and the charges against him were dropped.

[2] Counts One and Two named Thevis, Global, Fidelity, and Mahar as defendants. Fidelity was the parent corporation to Global, which in turn was the parent to several of Thevis' adult entertainment

the charge added by the superseding indictment, alleged a conspiracy among Thevis, Evans, and Hood to deprive Underhill of his civil rights in violation of 18 U.S.C. § 241. The trial lasted approximately eight weeks and produced a voluminous record.[3] Our recitation of the facts is therefore limited to only those absolutely essential to this appeal.

In the 1960's, Michael Thevis organized and controlled a group of corporations whose principal purpose was the profitable distribution of adult books and films. Underhill met Thevis in the fall of 1967 and became a Thevis employee. Together, Underhill and Thevis developed a profitable peep-show machine that was manufactured and distributed by two Thevis-controlled corporations, Automatic Enterprises and Cinematics. The government offered evidence as to five separate acts of racketeering in the conduct of this peep-show enterprise. These acts were the murders of two competitors in the adult entertainment business, two separate acts of arson against competitors, and the murders of Underhill and a bystander, Issac Galanti.[4]

The Hanna Murder

Kenneth "Jap" Hanna owned several adult book stores in Atlanta. On November 13, 1970, Thevis called Underhill at 8:30 a.m. and told him to come to work immediately. When Underhill arrived, Thevis stated that he had shot Ken Hanna and left the body in the trunk of

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corporations, including Cinematics, and Automatic Enterprises. Underhill, Clifford Jennings Wilson, and Jeff Lee were named as unindicted participants in Count One and as unindicted co-conspirators in Count Two.

[3] The record on appeal consisted of 118 volumes comprising nearly 16,000 pages.

[4] Although the Underhill-Galanti murders were predicate acts under the RICO counts, the indictment did not implicate Global in those murders. Global also was not charged in Count Ten.

Hanna's car in Thevis' warehouse. In his haste to dispose of the body, Thevis had left the car keys in Hanna's pocket, locked in the trunk. Thevis asked Underhill, a trained locksmith, to open the trunk and retrieve the keys. Thevis and Underhill then drove the car containing Hanna's body to the Atlanta airport parking lot and left it. Afterwards, Underhill took various steps to dispose of any incriminating evidence, including burning the moving pad on which Hanna's body had lain and replacing several bloody floor boards in the warehouse. In addition, he bought a welding torch outfit and melted the gun, the trunk lock, Hanna's car keys, some Mexican coins which had been in Hanna's possession, and a screwdriver. That night Underhill dumped the melted objects and the bloody boards in the Chattahoochee River.

During an interview with the FBI in 1977 Underhill showed agents the spot on the Chattahoochee where he disposed of the melted objects. A government diver found a pan containing melted objects. Analysis of the melted debris revealed two General Motors car keys, some Mexican coins, and a screwdriver on which appeared the letters "R", "D", and the beginning of either a capital "U", "B", or "W".

The Mayes Murder

Jimmy Mayes was employed by Thevis and Underhill to build peep shows. Underhill paid Mayes by giving him a percentage of his stock in the peep-show corporations. When Thevis took away half of Underhill's and Mayes' shares, Mayes became enraged and threatened to kill Thevis. In December of 1972, Thevis ordered Underhill to kill Mayes and gave him a gun for that purpose. Underhill had a chance to shoot Mayes one night, but could not pull the trigger. At Thevis' instruction, Underhill then hired Bill Mahar to do the job. Mahar told Underhill that he was going to kill Mayes by putting a pipe bomb in his truck. The bomb went off just before midnight, and literally blew Mayes to pieces.

Thevis was at this time in the hospital due to injuries sustained in a motorcycle accident. On the day of the murder, Underhill advised Thevis that the explosion would take place that night. After the explosion, Underhill went to the scene and found a piece of bone and a gold pin. He showed this evidence to Thevis in the hospital; Thevis said that he planned to make the bone into a paperweight. The day after the murder, Thevis instructed his nephew, Mann Chandler, to give Underhill money from Thevis' safe to pay Mahar.

The Louisville Arson

Nat Bailer, a competitor of Cinematics in the peepshow industry, owned a warehouse in Louisville, Kentucky. Thevis ordered Underhill to go to Louisville and burn the warehouse. On the weekend of April 27, 1976, Underhill drove to Louisville and, with two Thevis employees, Clifford Wilson and Robert Mitchum, set fire to the warehouse. Returning from Louisville, Underhill called Thevis and reported their success. The former Mrs. Underhill corroborated Underhill's out of town trip on April 27, 1970. She also noticed that he was dirty and smokey when he returned and remembered that he wanted to get rid of the clothes he was wearing.

The Fayetteville Arson

In 1972, Thevis operated an adult bookstore in Fayetteville, North Carolina. Herman Womack owned a competing bookstore just one block away. Thevis told Underhill to burn down the competitor. On September 19, 1972, Underhill and Mahar drove to Fayetteville and accomplished the arson by drilling a hole in the roof of the building, pouring gasoline down into the interior, and igniting it with a water pistol used as a flame thrower. Afterwards Thevis gave Underhill $1,500 with which he paid Mahar for the successful arson.

The Underhill-Galanti Murders

Under duress from Thevis, Underhill sold his interest in Cinematics to Thevis in 1971, but remained on Thevis' payroll (at about $50 per week) until Underhill went to prison in 1974. In 1975 Underhill filed a civil RICO suit against Thevis. While Underhill was in prison, the government sought unsuccessfully to get Underhill's cooperation in its investigation of Thevis. Underhill was paroled in January 1977 without having reached any specific agreement with the government. Following his parole, Underhill was granted immunity and began to cooperate. He gave lengthy recorded statements to the FBI in January 1977 and testified before a federal grand jury in May 1977. In June 1977, Underhill visited Thevis in the federal prison in Springfield, Missouri. Underhill wore a shoe mike provided by the FBI and recorded his conversation with Thevis. During this conversation Underhill told Thevis of his interviews with the FBI and that he had taken and passed a polygraph examination.

On April 28, 1978, Thevis escaped from the New Albany, Indiana, jail where he was confined during the trial of a civil case arising from the Louisville arson. Soon after his escape, he contacted defendants Evans and Hood. Jeanette Evans, a real estate agent in Marietta, Georgia, was a close personal friend of Thevis. Bart Hood, her cousin, was a detective in the Summerville, South Carolina, police department. Evans and Hood assited Thevis in establishing several aliases, in obtaining an apartment, a VISA credit card, and safe-deposit boxes.

Hood and Evans requested Dennis Bradley, their mutual cousin, to make silencers for a .38 caliber pistol. Evans also inquired about a silencer for a 30.06 rifle. Bradley made two silencers; he mailed one to Hood in Summerville on October 20, 1978, and Hood picked up the second silencer late in the afternoon on October 25,

1978. Hood normally kept a shotgun and a 30.06 rifle in the trunk of his car. On November 5, 1978, he reported the theft of the two guns to the Summerville police but requested that the theft receive no publicity.

Records indicated that Hood was on sick leave from October 9-13, October 16-20 and October 23-25. Hood later told an investigator for credit card companies that he had been in Atlanta with Clarence Feagin (a Thevis alias) on October 25, the date of Underhill's death. On October 24, 1978, Hood placed a call from the Journey's End motel in Atlanta to the South Carolina Highway Patrol in order to run a license check on the car being driven by Underhill.

Underhill owned an undeveloped tract of land on Riverside Drive in Atlanta. It had an unpaved driveway, blocked by a gate, which carried visitors quickly out of sight of the main road. At the time of Underhill's death, this property was for sale. On October 24, Evans went to the office of real estate agent Louis Carter, and asked to see the Fulton County tax maps. Evans first looked for a single-family residence on Riverside Drive, but was unable to locate it because she had the wrong address. Next, Evans asked about the Underhill property, claiming she had a prospective purchaser. Carter considered this request odd, because about a year and a half earlier Carter had contacted Evans about this same property. Evans at that time warned Carter not to have anything to do with the Underhill property, explaining that Underhill was dangerous and "involved with Michael Thevis' activities."

On October 21, 1978, Irene Williams, Underhill's fiancee, joined him at an Atlanta motel. Underhill intended to enter the Federal Witness Protection Program shortly, but wanted to sell the Riverside Drive property first. Ms. Williams and Underhill spent two days cleaning up the property. On Wednesday, October 25, Underhill left Williams at approximately 11:30 a.m. to keep

an appointment to show the property to Isaac N. Galanti. At about noon, Williams and her two children drove to meet Underhill. When she arrived, she noticed the gate was down and then found the bodies of Underhill and Galanti. She ran across the street to the residence of Henry and Pearl Stumminger.

On Tuesday night, October 24, Henry Stumminger had observed a car or truck bash into the gate on the driveway of the Underhill property. At 11:35 a.m. on October 25, Mrs. Stumminger heard seven or eight "pops," looked out the window, and saw a black car driving slowly up Riverside Drive. About twenty-five minutes later, a "hysterical" Irene Williams rang her doorbell.

Police and FBI agents were summoned to the scene. They found several shotgun shell casings and spent 30.06 shells. Underhill had died from one or more shotgun blasts. Galanti had been killed by gunshot wounds to the head and neck. One wound on his neck was attributable to a high-powered rifle, such as a 30.06.

At trial the government presented identification testimony from two eyewitnesses: Rodney Letchworth, who placed Thevis at the scene of the Underhill-Galanti shooting, and Milton McMurray, who placed Thevis, Evans, and Hood together approximately forty-five minutes after the murders. At approximately 11:30 a.m. on October 25, Letchworth, a retired marine pilot, had driven by the Underhill property and noticed a man standing near the gate. He later identified this individual as Thevis. McMurray, a commercial airline pilot, was a neighbor of Evans. At 12:10 p.m. on October 25, and again about 15-20 minutes later, McMurray observed Evans and two men drive past his yard. At trial, he identified the man in the front seat as Thevis, and the man in the back as Hood.

Thevis and Evans were arrested on November 9, 1978 in Bloomfield, Connecticut. A search of their persons

and their car yielded firearms, $411,000 in cash, and over one million dollars worth of jewelry. A search of a rental locker in South Windsor, Connecticut disclosed a transcript of interviews the FBI had conducted with Underhill. Fingerprint analysis revealed over 100 of Thevis' fingerprints and palm prints throughout the transcript and one of Evans' fingerprints on an inside page of the transcript.

Immediately after his arrest, Thevis was confined in a federal prison in Danbury, Connecticut. His cellmate, Bernard McCarthy, testified that Thevis had confessed to the murder of Underhill. According to McCarthy, Thevis told him that he had lured Underhill to his property by breaking the fence down, where he "assassinated" Underhill and his "bodyguard" with a shotgun. Thevis explained that he killed Underhill because Underhill intended to testify against him, and that Underhill was to enter the marshal's protection service the following Monday. Thevis boasted to McCarthy that while a fugitive he had travelled incognito in the Atlanta area, once receiving a speeding ticket there. Police later determined, based solely on McCarthy's information, that Thevis had received such a ticket using the name C. M. Feagin. McCarthy was also able to describe the contents of Thevis' car at the time Thevis was arrested.

II. Challenges to the Indictment

A. *The Interpretation of RICO*

Appellants make three separate arguments that the trial court erred in construing RICO. First, they claim that the trial court should have struck the Underhill-Galanti murders from Counts One and Two of the indictment (the RICO charges) because the evidence failed to show that Thevis was "associated with" the enterprise at the time of the murders, and because the murders were not acts through which Thevis conducted the affairs of the enterprise.

This contention is without merit. As this court noted in *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), proof of association with a RICO enterprise may depend wholly on circumstantial evidence. The record in this case contains such evidence. Although Thevis had purportedly sold his interest in the pornography business to his secretary, Laverne Bowden, for $16 million dollars, the note securing the sale was always in default. Thevis, therefore, could foreclose at any time and regain his interest in the business. Rodney Glen Smith, a cellmate of Thevis in 1977, testified that despite the "sale," Thevis stated he still "controlled" his pornography empire; given the terms of the "sale" and the fact Thevis had contacted Ms. Bowden after his escape from jail in 1978, one could infer that Thevis' interest in the success of the pornography enterprise continued until the Underhill murder. The murder itself, moreover, neatly advanced Thevis' interests in the enterprise. The original indictment in the case sought forfeiture of all the assets of Global and Fidelity under RICO forfeiture provisions.[5] The Underhill murder was designed to prevent the government's key witness from testifying at trial, thus imperiling the government's entire RICO case and preventing both RICO criminal convictions and forfeiture. The murder, therefore, protected the integrity of the enterprise. Keeping the enterprise together was inextricably tied to furthering its business; hence the Underhill murder was a proper predicate act under § 1962. *See United States v. Welch*, 656 F.2d 1039, 1060-62 (5th Cir. 1981) (predicate acts only required to have sufficient nexus with enterprise to be properly charged under RICO).

Appellants' second argument is that the term "enterprise" as used in RICO does not include the specific association charged in this case. The RICO definitions sec-

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[5] 18 U.S.C. § 1963.

tion, 18 U.S.C. § 1961, states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or other group of individuals associated in fact although not a legal entity . . . ." Appellants contend that because the indictment described the enterprise as "a group of individuals associated in fact with various corporations," the enterprise alleged did not fall within the literal bounds of the statutory classifications. We reject this claim.

This specific question is one of first impression. We nevertheless are convinced, as was the trial court, *United States v. Thevis*, 474 F.Supp. 134, 137 (N.D.Ga.1979), that RICO covers the enterprise alleged in this case. Use of the verb "includes" in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the language "reveals that Congress opted for a far broader definition of the word 'enterprise'." *United States v. Turkette*, —— U.S. ——, 101 S.Ct. 2524, 2533-34, 69 L.Ed.2d 246 (1981). *See United States v. Elliott*, *supra*, at 897 (quoting *United States v. Hawes*, 529 F.2d 472, 479 (5th Cir. 1976)). Moreover, the House report accompanying RICO stated that "enterprise" included "associations in fact, as well as legally recognized associative entities. Thus infiltration *of any associative group by any individual or group* capable of holding a property interest can be reached." House Rep.No.91—1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S.Code Cong. & Ad.News 4007, 4032 (emphasis added). Although the term "enterprise" may have some limits,[6] the indictment in this case properly alleged an "association in fact" within the scope of § 1961.

Appellants' final argument is that RICO was not intended to apply to illegitimate enterprises such as the association alleged here. The Supreme Court has now

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[6] *Cf. United States v. Mandel*, 415 F.2d 997 (D.Md. 1976) (State of Maryland not an "enterprise").

decided this issue in *United States v. Turkette*, —— U.S. ——, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), holding that RICO applies to both illegitimate and legitimate enterprises.

B. *The Charge Under 18 U.S.C. § 241*

Count Ten of the indictment charged Thevis, Evans and Hood with violating 18 U.S.C. § 241. That section makes criminal a conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ." The government alleged that Thevis, Evans and Hood had conspired to injure Underhill in the exercise of his right to testify at trial. Appellants urge that this charge failed to state a crime because the right to testify is not one secured by the Constitution or laws of the United States.

To support this contention, appellants cite *United States v. Sanges*, 48 F. 78 (5th Cir. 1891), which specifically held that the right to testify was not one secured by the Constitution or laws of the United States. Although ordinarily a panel must adhere to prior decisions of this Court, our first duty is to follow the dictates of the United States Supreme Court. We therefore must consider whether the Supreme Court's decision in *In Re Quarles*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1894), overruled *Sanges sub silentio*.

Quarles involved a conspiracy charge under the predecessor statute to § 241. The victim of the conspiracy was assaulted for reporting a violation of the federal tax laws to a deputy United States Marshal for the Northern District of Georgia. The Court held that the right to report a crime, although not specifically guaranteed by the Constitution, nonetheless "arose out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." 158 U.S. at 535-36, 15 S.Ct. at 961. The Court concluded, "It is the duty and right . . . of every citizen,

to assist in prosecuting, and in securing the punishment of any breach of the peace of the United States." *Id.* at 535, 15 S.Ct. at 960-961 (emphasis added).

Thus while *Quarles* did not specifically address the right to testify, the language and reasoning encompass such a right. Testifying at trial both "assists the prosecution" and "secures the punishment" of a crime. Moreover, as the Second Circuit noted in *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974) (holding that the right to testify is one guaranteed by federal law):

> Our federal government has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation or force. Otherwise, the foundations of federal justice would be undermined.

See United States v. Smith, 623 F.2d 627 (9th Cir. 1980); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977). *See generally, Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (en banc) (interpreting 42 U.S.C. § 1985(2) as providing a cause of action for racial- or class-based interference with testifying at trial). We conclude, therefore, that *Quarles* implicitly overruled *Sanges*, and the Supreme Court's reasoning controls this case. Thus we hold that the right to testify at trial is one secured by the Constitution, and that the conspiracy charged in the indictment properly stated a federal crime.

III. The Evidentiary Rulings

A. *Admission of Underhill's Grand Jury Testimony*

Having determined that the charges in the indictment were proper, we proceed to consider appellants' various

evidentiary claims. One of their major contentions is that the trial court erroneously admitted certain transcripts of Underhill's grand jury testimony and FBI interviews as substantive evidence of guilt on the RICO charges.

The government's principal witness in the RICO case against Thevis and Global was to be Thevis' former business associate, Roger Dean Underhill. Following Underhill's murder, the government notified the court and the defendants that pursuant to Fed.R. Evid. 804(b)(5),[7] it intended to offer portions of Underhill's grand jury testimony and interviews with the FBI as substantive evidence of Thevis' guilt under Counts One and Two. The court permitted the government to offer its evidence as to Count Ten first, in order to establish that Thevis was responsible for Underhill's death and provide a basis for the court to rule on the 804(b)(5) issue. The court then admitted specific portions of Underhill's testimony as con-

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[7] Rule 804(b) deals with exceptions to the hearsay rule for statements made by a declarant who is now unavailable for trial. The exceptions include former testimony, 804(b)(1); dying declarations, 804(b)(2); statements against interest, 804(b)(3); and statements of personal or family history, 804(b)(4). Subsection (b)(5) is the residual exception for the situation in which the declarant is unavailable. This subsection reads as follows:

> (5) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

taining sufficient "circumstantial guarantees of trustworthiness" as required under Fed.R.Evid. 804(b)(5). The court also held that although admitting the evidence under Rule 804(b)(5) would have violated Thevis' confrontation rights under the sixth amendment, the government had established by "clear and convincing" evidence that Thevis had caused Underhill's death; hence, Thevis had waived his confrontation rights. *United States v. Thevis*, 84 F.R.D. 57 (N.D.Ga.1979).

In contending that the trial court erred in admitting the Underhill evidence, appellants make three arguments. First, appellants claim that the evidence did not have the "circumstantial guarantees of trustworthiness" required to meet Rule 804(b)(5). Appellants also contend that the trial court erred in applying the "clear and convincing" standard to the proof of Thevis' waiver, arguing that the "beyond a reasonable doubt" standard should apply. Finally, appellants argue that even if Thevis waived his confrontation rights, Underhill's statements were so untrustworthy that their admission violated due process.

The issue of admissibility of a witness' hearsay statements in the face of a defendant-caused absence of that witness from trial is a question of first impression in this circuit, although other circuits have faced this problem under slightly different circumstances. In *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980), the Tenth Circuit confronted a situation in which the defendant had coerced the witness into silence by threatening the witness' life. The court held that the defendant had waived his confrontation rights and without further explanation stated that such a waiver was *a fortiori* a waiver of any hearsay objection. In *United States v. West*, 574 F.2d 1131 (4th Cir. 1978), a key government witness had been murdered prior to trial, but that murder had not been connected to the defendants. Nevertheless, the Fourth Circuit found that the witness' grand jury testimony met the reliability standards of

Rule 804(b)(5) and was sufficiently trustworthy that its admission did not violate the confrontation clause. Finally, *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977), the case the trial court primarily relied on here, involved facts similar to those in *Balano*. After determining that the witness' grand jury testimony met the standards of Rule 804(b)(5), the Eighth Circuit held that, even assuming admitting the evidence would violate the confrontation clause, the defendant had waived his confrontation rights by intimidating the witness into silence.

We reject both the *West* and *Carlson* approaches to this issue, based upon our reading of Rule 804(b)(5) and relevant Supreme Court precedent. As to *Carlson*, we are convinced that Rule 804(b)(5) does not require finding a confrontation clause waiver once a court has concluded that the proffered evidence has met the reliability standards of the Rule. Both the wording of the Rule[8] and the legislative history[9] indicate that Congress in-

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[8] *See* note 7, *supra*.

[9] The Senate Report stated:

> The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)[(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.
>
> We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumer-

tended evidence to be admitted under 804(b)(5) only if the reliability of the evidence *equals* or *exceeds* that of the other exceptions in Rule 804(b). The Supreme Court

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ated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. *See also United States v. Barbati*, 284 F.Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability

has held that as to two of the other exceptions, dying declarations and prior testimony where cross-examination has already occurred, the reliability of the admitted evidence satisfies the confrontation clause. *See Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 2540-41, 65 L.Ed.2d 597 (1980) (prior testimony); *Mattox v. United States*, 156 U.S. 237, 243-44, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895) (dying declarations). *See also, Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 1069-70, 13 L.Ed.2d 923 (1965) (citing *Mattox* for the proposition that the Court has recognized the admissibility of dying declarations despite lack of confrontation). Hence we find that imposing on 804(b)(5) admissibility the additional condition of a waiver of confrontation rights is contrary to the express

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than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule. S.Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad.News 7051, 7065-66.

wording of the Rule, congressional intent, and Supreme Court precedent.[10]

A more fundamental disagreement with both *West* and *Carlson* is the conclusion in those cases that corroborated grand jury testimony in fact meets the reliability standards of Rule 804(b)(5). The Senate Judiciary Committee's report on the Federal Rules of Evidence stated that the 804(b)(5) residual exception was to be used only rarely, in truly exceptional circumstances.[11] Corroborated grand jury testimony which for one reason or another is unavailable at trial is neither rare nor exceptional, and in our opinion its general admission under this theory would constitute a "major revision" of the hearsay rule that, as the Senate Judiciary Committee admonished, is for the legislature, not the judiciary. Grand jury testimony, although given under oath, is not subjected to the vigorous truth testing of cross-examination, as is prior testimony. Grand jury testimony, moreover, is often given under a grant of immunity which might encourage a witness to "embellish" his story. We need not determine whether grand jury testimony ever meets the stringent reliability standards of Rule 804(b)(5),[12] however, be-

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[10] *See United States v. Ward*, 552 F.2d 1080 (5th Cir.), *cert. denied*, 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 119 (1977) (admitting in a criminal trial evidence which met the standards of Rule 804(b)(5) without finding a waiver of confrontation rights).

[11] *See* note 9, *supra*.

[12] *E.g., compare United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) (grand jury testimony not admissible under facts of case) *with United States v. Ward*, 552 F.2d 1080 (5th Cir.), *cert. denied*, 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 119 (1977) (hearsay statements of truck driver to FBI agent admissible where FBI agent had confirmed all the details of the statement and "nothing was uncovered to refute his version of the events"). *See also* the dissent of Justices Stewart and Marshall from the denial of certiorari in *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978) which strongly implies that grand jury testimony may not meet the reliability standards of Rule 804(b)(5).

cause we conclude other grounds support the admission of the Underhill statements. Thus while we agree with the trial court's application of the "clear and convincing" standard to the admissibility question, we find the evidence admissible on a different basis than did the trial court: adopting the Tenth Circuit's approach in *Balano*, we hold that Thevis' waiver of his right to confrontation in these circumstances also constituted a waiver of any hearsay objection.

1. The Constitutional Waiver

The sixth amendment to the Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." All parties to this appeal agree that this right may be waived in a proper case. *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). Whether a waiver existed in this case requires analyzing two separate questions: whether a defendant's murder of a witness for the purpose of preventing his testifying at trial constitutes a valid waiver, and what standard of proof the government must bear in proving that waiver.

A waiver of a constitutional right is ordinarliy valid only if there is "an intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). A variety of actions by the accused constitute an express waiver of the right to confrontation. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (guilty plea); *United States v. Stephens*, 609 F.2d 230 (5th Cir. 1980) (stipulations to evidence). The accused, however, may also waive his confrontation rights indirectly, such as by absenting himself from trial, *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973), or engaging in contumacious conduct which requires his removal from the courtroom. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

We conclude that a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation under the *Zerbst* standard. A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence in such a situation the defendant has intelligently and knowingly waived his confrontation rights.

The policy interests underlying the confrontation clause, moreover, mandate this result. We recognize that the right of confrontation is so fundamental to our concept of a fair trial that it is a privilege specifically guaranteed by the Constitution. Nevertheless, both *Taylor* and *Allen* indicate that the right is not absolute, and must give way at times to stronger state interests. Similarly, when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution "would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause," *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977), and make a mockery of the system of justice that the right was designed to protect.

The question of the proper burden of proof to apply to the waiver question presents a more difficult issue. Appellants claim that the "reasonable doubt" standard should apply, relying in part on the Supreme Court decision *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).[18] As the Court later noted in *Lego*

[18] In *Winship*, a juvenile was adjudged delinquent on the basis of a preponderance of the evidence that he had committed an act which would constitute a crime if he were an adult. The Supreme Court held that such adjudication must be based on the "reasonable doubt" standard.

v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), however, *Winship* "was not concerned with the standards for determining the admissibility of evidence"; rather, *Winship* merely affirmed the necessity for the prosecution, in order to secure a conviction, to prove every essential element of the offense beyond a reasonable doubt. Here the trial court's decision to admit Underhill's statements was purely an evidentiary ruling, not a decision on Thevis' substantive guilt. Hence we reject appellants' "reasonable doubt" standard on the basis of the Supreme Court's analysis in *Lego*.

Because of the intimate association between the right to confrontation and the accuracy of the fact-finding process, however, we also reject the government's suggestion that the "preponderance" standard accepted by the Supreme Court in *Lego* (to judge the voluntariness of a confession) and *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (to judge whether a warrantless search was consensual) is also adequate to protect confrontation rights.

The Supreme Court repeatedly has noted the importance of confrontation rights in testing the reliability of evidence. Indeed, the Court in its most recent confrontation clause case declared that the role of confrontation in testing accuracy is so important "that the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process." *Ohio v. Roberts*, 448 U.S. 56, 64, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 579 (1980) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973) and *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)). The Court, moreover, has stated that "a primary interest secured by [the confrontation clause] is the right to cross-examination," *Ohio v. Roberts*, *supra* at 63, 100 S.Ct. at 2537 (quoting *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed. 2d 934 (1965)), which has been described as "the great-

est legal engine ever invented for the discovery of truth." J. Wigmore, Evidence § 1367 (3d ed. 1940). As we have previously noted:

> [T]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Smith v. Estelle, 569 F.2d 944, 946 (5th Cir. 1978) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (citations omitted)).

Where reliability of evidence is a primary concern, the Supreme Court has conditioned admissibility on the "clear and convincing" standard. The prosecution, for example, must prove by clear and convincing evidence that an in-court identification that follows a tainted identification has a reliable independent basis before the identification can be admitted into evidence. *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967); *Cannon v. Alabama*, 558 F.2d 1211, 1218 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). In contrast, judicial determinations of the admissibility of evidence under the exclusionary rule normally do not relate to the reliability of the evidence, but instead are aimed at deterring police misconduct. *Stone v. Powell*, 428 U.S. 465, 486-87, 96 S.Ct. 3037, 3048-49, 49 L.Ed.2d 1067 (1976); *United States v. Brookins*, 614 F.2d 1037, 1046-47 (5th Cir. 1980). *See Lego v. Twomey*, 404 U.S. 477, 484-85 & nn. 12 & 13, 92 S.Ct. 619, 624-25 & nn. 12 & 13, 30 L.Ed.2d 618 (1976) (purpose of voluntariness hearing is not to decide reliability of confession).[14] Thus because confrontation rights

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[14] In *Brookins* this court noted that reliability of evidence played a secondary role in fifth and sixth amendment suppression hear-

are so integral to the accuracy of the fact-finding process and the search for truth, in contrast to the exclusionary rule, we conclude that the trial court was correct in requiring clear and convincing evidence of a waiver of this right.

2. Waiver of the Hearsay Objection

In *United States v. Balano*, 618 F.2d 624 (10th Cir.), *cert. denied*, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980), the Tenth Circuit faced a situation in which the defendant had coerced the witness into silence. The court stated that waiver of one's right to confrontation was *a fortiori* a waiver of one's right to raise a hearsay objection. *Id.* at 626. We agree, basing our decision on an analysis of the interests served by both the confrontation clause and hearsay rule.

Although the Supreme Court explicitly has held that the confrontation clause and the hearsay rule are not coterminous, *California v. Green*, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1933-34, 26 L.Ed.2d 489 (1976), the Court recently has stated that it is a "truism" that both provisions protect the same values. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). Both the confrontation clause and the hearsay rule seek to balance the need for relevant, probative evidence against the defendant's interest in testing the accuracy of evidence through personal confrontation and cross-examination.[15] *See id. Cf.* Fed.R.Evid. Advisory Committee's

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ings. Nevertheless, once a confession, for example, is found "voluntary" and admitted, the defendant may still cross-examine various witnesses concerning the credibility of that confession at trial. In contrast, the loss of confrontation rights precludes cross-examination, although we note that in this case the defendants did introduce evidence to impeach Underhill.

[15] Of course, an incidental interest served by the hearsay rule to the extent it excludes unreliable evidence is the integrity of the fact-finding process. Nevertheless, this interest is counterbalanced

Note on the Hearsay Problem, *quoted in* 4 J. Weinstein, Evidence 800-02 to 800-03 (1979). As noted by the Supreme Court in *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed.2d 409 (1895), the confrontation clause envisions:

> "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Similarly, the hearsay rule envisions testimonial evidence given under the ideal conditions of a witness under oath, in the personal presence of the trier of fact, and subject to cross-examination. Advisory Committee Note, *supra* at 800-02. The reason that the hearsay rule and confrontation clause are not coterminous is not because the two provisions protect different interests, but because the two may balance the relevant interests differently. Thus a particular hearsay rule may admit evidence which offends confrontation rights because the rule favors the need for evidence and its probable reliability over the defendant's confrontational rights. Conversely, a particular hearsay rule may restrict evidence which nevertheless satisfies the confrontation clause because the rule favors increased protection for the defendant. *California v. Green*, 399 U.S. 149, 156, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). *See Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).[16] In either case, however,

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by a concern that in the adversary process each side must develop his own case. If integrity of the judicial process were the overriding concern with hearsay, we would not permit one to waive the hearsay objection at trial by failing to raise it.

[16] In *Barber* the prosecution introduced at trial in Oklahoma state court a transcript of the testimony of a witness given at a pre-

the key interest offsetting the need for evidence is the defendant's interest in confrontation; if this interest is removed by a waiver of confrontation rights, the balance must necessarily fall in favor of the need for evidence. We hold, therefore, that under the circumstances of this case, Thevis' waiver of his confrontation rights also acted as a waiver of the right to raise a hearsay objection once the prosecution demonstrated a need for the evidence.[17]

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liminary hearing. The defendant was represented by counsel at the hearing, but counsel did not cross-examine the witness. At the time of trial, the witness was incarcerated in a Texas federal prison and the trial court concluded that his absence from the jurisdiction made the witness "unavailable" under an Oklahoma hearsay rule exception; the court then admitted the transcript. The Supreme Court reversed, holding that admitting the transcript violated the defendant's confrontation rights because the witness was not truly "unavailable."

We have not found a case dealing with the situation in which a hearsay rule offers a criminal defendant greater protection than the confrontation clause. This is not unusual in light of the fact that a criminal defendant who loses at trial would not assert as grounds for appeal that the hearsay rule should have offered him less protection.

[17] We wish to emphasize that our resolution of the admissibility of Underhill's grand jury testimony does not permit wholesale admission of hearsay evidence when a witness is unavailable. Under the approach we adopt, a hearsay statement of a potential witness is admissible only if the government shows, by clear and convincing evidence, that (1) the defendant caused the witness' unavailability (2) for the purpose of preventing that witness from testifying at trial. Thus hearsay evidence would not be admissible simply because the witness was missing. Moreover, even if the government proved by clear and convincing evidence that the defendant had caused the witness' absence, the hearsay evidence would still not be admissible until the government proved the second part of the test, i.e., that the defendant-caused absence was for the purpose of preventing the witness from testifying. In addition, the "clear and convicing" standard of proof dictates that close cases must be resolved in favor of the defendant. Here, however, the trial court specifically found clear and convincing evidence showing that to prevent Underhill from testifying at trial "Thevis and others including defendants Evans and Hood conspired to murder Underhill, and on

3. The Due Process Objection

We also reject appellants' contention that admitting the Underhill testimony, even if otherwise proper, violated due process by permitting a conviction based on unreliable evidence. While a case may exist in which the evidentiary base is so totally lacking in reliability that a conviction would violate due process, *California v. Green*, 399 U.S. 149, 163 n.15, 90 S.Ct. 1930, 1938 n.15, 26 L.Ed2d 489 (1970), this is not such a case. Other evidence sufficiently corroborated Underhill's testimony that the trial court concluded that the statements met the stringent reliability standards of Fed.R.Evid. 804(b)(5).[18] While we do not decide if the trial court correctly ruled on the 804(b)(5) issue, we find that the corroborative evidence indicated that Underhill's statements were not "totally lacking" in reliability, and that a conviction based upon this evidence did not violate appellants' due process rights.

B. *Claims Under Rule 403*

Appellants raise several points which relate to trial court rulings under Fed.R.Evid. 403. Because all these

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October 25, 1978, the objective of the conspiracy was successfully attained." *United States* v. *Thevis*, 84 F.R.D. 57, 73 (N.D.Ga. 1977).

Even when the government meets this two-part test, the trial court should scrutinize the proffered statements to ensure that the evidence is not unreliable. If the evidence appears unreliable, its probative value may well be outweighed by the unfair prejudice resulting from unreliability and should be excluded under rule 403. Moreover, admission of totally unreliable evidence may raise due process objections. *See* discussion *infra*. We note that in this case, however, sufficient indicia of reliability existed to avoid rule 403 or due process problems. *See* Part III A 3 of this opinion, *infra*, and the summary of corroborative evidence in *United States v. Thevis*, *supra*, at 66-68.

[18] This corroborative evidence is explained in detail in the trial court's opinion dealing with the admission of the Underhill statements. *United States v. Thevis*, 84 F.R.D. 57, 66-68 (N.D.Ga. 1979).

points involve the same legal principles and standard of review, we will discuss them together.

1. The Standard of Review

Under Fed.R.Evid. 403, a trial judge may exclude relevant evidence if he finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant from admitting the evidence. Nevertheless, because it permits a trial court to exclude concededly probative evidence, Rule 403 is an extraordinary remedy which should be used sparingly. As this court noted in *United States v. McRae*, 593 F.2d 700 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed2d 83 (1979):

> Relevant evidence is inherently prejudicial; but it is only unfair prejudice substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance.

593 F.2d at 707 (emphasis original). In making this decision, the trial court has broad discretion which is reviewable only for abuse. *Ramos v. Liberty Mutual Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980), *cert. denied*, *Rucker Company v. Shell Oil Company*, 449 U.S. 1112, 101 S.Ct. 921, 66 L.Ed.2d 840 (1981); *United States v. McRae*, *supra*; *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978). With this standard as background, we proceed to assess appellants' numerous claims of error.

2. Exhibit 47

As part of its proof of Count Ten the government introduced a transcript of interviews of Underhill taken

by FBI agents in January 1977, shortly after Underhill received immunity and agreed to cooperate with the government in its investigation of Thevis. In these interviews, Underhill accused Thevis of plotting several murders and committing numerous assaults, bombings, extortions and arsons. In addition to accusations of specific crimes, Underhill repeatedly speculated that Thevis had Mafia connections and had tried or would try to have him killed.

In June 1978, the grand jury returned its first RICO indictment against Thevis. As part of pre-trial discovery for the corporate defendants, and in preparation for a deposition of Underhill, the government provided to defense counsel a 363-page copy of Underhill's tape-recorded FBI interviews. After Thevis was arrested in November 1978 in Connecticut, a search of a nearby rental locker revealed a copy of the Underhill interview. Thevis' fingerprints appeared on pages throughout the transcript, and one of Evans' fingerprints was found on an inside page. At trial the government sought to introduce a copy of the Underhill transcript, exhibit 47, as evidence that Thevis knew Underhill was cooperating with the government and therefore had a motive to kill Underhill to prevent him from testifying. Defense counsel objected to the admission of exhibit 47 on the basis of Rule 403. The defense, moreover, offered to stipulate that Thevis knew Underhill was cooperating with the government, thereby rendering admission of exhibit 47 unnecessary. The court rejected defendants' offer to stipulate and ruled that the exhibit was admissible to show Thevis' knowledge and motive. In order to avoid the risk that the jury would misuse the evidence, the court gave limiting instructions, both at the time of admission and in the final instructions, that the jury could not consider the exhibit for the truth of its contents; rather, it could only consider the exhibit as it bore upon the motives of those who had knowledge of its contents.

Appellants argue that these limiting instructions were ineffective and forced the jury to perform "mental gymnastics." They assert that the allegations of other crimes and "bad acts" in the interviews were so damning that no jury could have ignored them. Moreover, they contend that their admission was unnecessary in view of the defense offer to stipulate to Thevis' knowledge that Underhill was a government witness. While appellants concede that exhibit 47 was probative as to Thevis' knowledge, they vigorously contend that the nature of the statements in the transcript unfairly prejudiced the jury against Thevis, and that this prejudice substantially outweighed any probative value.

We disagree. Count Ten alleged that Thevis had conspired to murder Underhill in order to prevent his testifying in the upcoming trial. Government exhibit 47 was highly probative in establishing that Thevis had a motive to kill Underhill. The transcript did more than merely indicate that Underhill was cooperating, perhaps grudgingly, with the government in the Thevis investigation; the sweeping nature of the accusations demonstrated that Underhill was willing to "tell all" to the government. Although the potential for unfair prejudice certainly existed, the probative value of the exhibit was at least equally strong.

Nor do we find that the defense offer to stipulate to Thevis' knowledge of Underhill's cooperation with the government obviated the government's need for this evidence. Had a stipulation carried similar probative weight as the proffered evidence, the potential for unfair prejudice may have warranted exclusion of the exhibit. As noted above, however, the transcript revealed more than the bare fact that Underhill had agreed to cooperate; it indicated that Underhill was furnishing total and voluntary cooperation. At issue was the effect of Underhill's cooperation on the mind of Thevis; the transcript revealed the extent of Underhill's "doublecross" and provided an explanation for

why Thevis chose to murder Underhill to prevent his testifying rather than some less drastic action. The stipulation could not have carried the same force in proving motive. As we previously have said:

> A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence," 9 Wigmore on Evidence § 2591 at 589 (3rd ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right "to present to the jury a picture of the events relied upon."

United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979), *vacated on other grounds*, 448 U.S. 902, 100 S.Ct. 3041, 65 L.Ed.2d 1131 (1983), *on remand*, 626 F.2d 444 (5th Cir. 1980) (quoting *Parr v. United States*, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958)). Accordingly, we will not disturb the trial court's discretionary decision that the prejudicial impact of the decision did not substantially outweigh its probative value.

Finally, we do not agree with appellants that the limiting instructions necessarily confused the jury. All parties concede that Underhill's statements were hearsay and could not be considered for their truth. Nevertheless, the statements were admissible as evidence of Thevis' knowledge of Underhill's cooperation. *See, e.g., United States v. Parry*, 649 F.2d 292 (5th Cir. 1981); *United States v. Bankston*, 603 F.2d 528 (5th Cir. 1979).

The court carefully instructed the jury when exhibit 47 was introduced that the statements in the transcript were "absolute hearsay" and could not be considered for any purpose other than motive. The court's explanation of this distinction was a correct statement of the law, and rendered the distinction easily understandable to the jury.

See United States v. Parry, supra, at 295; *United States v. Wyatt*, 611 F.2d 568, 569 (5th Cir. 1980).

3. The "Shoe-Mike" Evidence

In June 1977 Underhill visited Thevis in prison in Springfield, Missouri, ostensibly to discuss settlement of Underhill's pending civil RICO suit against Thevis. Unknown to Thevis, Underhill carried a small transmitter in the heel of his shoe, permitting FBI agents to monitor and tape the conversation. At one point Underhill told Thevis that he had taken a polygraph test to corroborate his story concerning the Mayes and Hanna murders, had implicated Thevis in the murders, and had "passed with flying colors." Thevis responded, "No wonder you passed." [19]

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[19] The relevant part of the conversation was as follows:

Underhill: [RDU] I won't say too much right now, Mike, look, let me show you something. I got problems. Now, look, when I took the test for the FBI, what agent was there, uh, King was there and FBI polygraph examiner was there, and Roger Thompson was there . . . and he looked at the question and struck a couple . . .

Thevis: [MGT] What did you take a polygraph test on?

RDU: They asked me if I killed Jimmy Mayes. And they asked me if I killed Ken Hanna and if I put his body in the car and if I saw him alive that day. I said, no, no, no.

MGT: Well didn't they also ask you if you had any knowledge of it or et cetra, et cetera?

RDU: Yeah.

MGT: How did you do?

RDU: I didn't tell any lies and they said I passed the test with flying colors. One thing they asked me, they said that, uh, that, that, now see I had the privilege.

MGT: You didn't tell any lies.

RDU: No, sir, but I had the privilege. Roger Thompson says you had the privilege. Nothing can be used in, uh, out of this, out of this thing against anybody, and some of the things that (cough) they asked me if, if I know who killed Ken, Ken Hanna.

[Footnote continued on page 39a]

Over strong objections by defense counsel, the trial court admitted this conversation only as evidence showing Thevis knew Underhill was cooperating with the government, and sternly instructed the jury on the legal position of polygraph evidence.[20] The court repeated the limiting

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[19] [Continued]

MGT: Yeah, . . .

RDU: Somebody tell you who killed him, I said yes.

MGT: You said yes, you know?

RDU: I said yes, I know, because I, I told Roger Thompson . . . I'd tell the truth, you know. So anyway, they couldn't use this thing to bring me before the grand jury.

MGT: But they didn't ask you any further things like . . .

RDU: Like, uh, now Roger Thompson struck a lot of this off?

MGT: They didn't ask you any further things if you were an accompilce in it . . . or if you helped in any way?

RDU: They asked if I had knowledge. They asked me if I had built a bomb. I said no. That killed Jimmy Mayes. They asked me if I saw the bomb. I said no. They asked me if I was downtown or saw Mayes the night that he was killed. I said no.

MGT: Well, what'd they, what'd they, what'd you tell 'em when they asked you if I did it?

RDU: I said yes.

MGT: Well, you mean you . . .

RDU: You wouldn't want me to lie.

MGT: No wonder you passed.

RDU: You expect me to tell the truth.

MGT: No wonder you passed. I believe it.

RDU: I'd passed the test with flying colors. They told Thompson . . .

[20] THE COURT: Ladies and gentlemen, when you were about to hear these tapes, the Court gave you a limiting instruction as to how to view the tapes and the transcript. The tapes which you have just heard and the transcripts which were admitted for the limited purpose for which I have described its admission include a reference to a polygraph examination taken by Roger Underhill. You are not to draw any inference from the statement that Robert—you are not to draw any inference from any statement about any polygraph examination that Roger Underhill's testimony is any more credible than any

instruction in its final charge to the jury. Despite these limiting instructions, appellants contend that the probative value of the evidence was far outweighed by the unfair prejudice to Thevis evoked by Underhill's references to the polygraph test, especially in light of the prior

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other witness, for under the law, the results of a polygraph or lie detector test are considered to be scientifically unreliable evidence and inadmissible for that very purpose.

I know of no court in which the results of a polygraph test will be admitted for the purpose of showing any scientific results thereof. The references to the test are not to be considered by you in any manner which might bolster the credibility of Roger Underhill. The statement as to the polygraph test or lie detector test as it is sometimes called was admitted for the extremely limited purpose of showing, if it does, that Underhill had cooperated or was cooperating with the government, and that Underhill told the defendant, Mr. Thevis, of this cooperation in the manner related with reference to his statements about a polygraph test.

Whether or not this is true is a question of fact for you to resolve. This evidence is not admitted for any other purpose, and except for the limited purpose I have outlined, it has no probative value at all. It is, of course, not admitted against anyone in the case but Mr. Thevis.

Now, in addition to that, the conversations purported to be on these tapes between Mr. Thevis and Mr. Underhill contain numerous statements by one or the other as to what some person has said to one or the other of them. I instruct you that when an individual relates what someone else had said to him, it is hearsay and has no probative bearing. And, this tape, as I have indicated, is admissible only for the purpose of showing, if it does, cooperation by Mr. Underhill with the Government and showing, if it does, the knowledge on the part of Mr. Thevis that Mr. Underhill was cooperating with the Government, if it does show that.

Any references to polygraph examinations have no merit, no bearing, and no evidentiary value in the case except to show, if they do, what one individual may have told the other as to his cooperation with the Government. I reiterate that a polygraph test is completely without admissibility as to its results, and would not be admitted into evidence in any court that I know of for the results thereof.

admission of exhibit 47 as motive evidence. Therefore, appellants claim the trial court committed reversible error by not excluding the evidence under Rule 403.

We reject appellants' argument. While they are correct in conceding that exhibit 47 provided the jury with strong motive evidence, that exhibit required the jury to infer Thevis' knowledge from the fingerprints on the exhibit. In contrast, the "shoe-mike" conversation was direct evidence that Thevis knew Underhill was cooperating with the government fully and voluntarily, and thus the conversation was highly probative in its own right. As to the danger of unfair prejudice, we are especially sensitive to the possibility of prejudice arising from courtroom references to polygraph tests. As a result, this circuit has ruled that polygraph results are inadmissible as substantive evidence. *E.g., United States v. Masri*, 547 F.2d 932, 936 (5th Cir.), *cert. denied*, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977); *United States v. Cochran*, 499 F.2d 380, 393 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124, 95 St.Ct. 810, 42 L.Ed.2d 825 (1975). Nevertheless, we note that here the reference to Underhill's polygraph was not admitted for its truth, but as evidence that Thevis knew Underhill was cooperating with the government. Given the very high probative value of this evidence and the strong limiting instructions, we are unable to say that the danger of unfair prejudice *substantially* outweighed the conversation's probative value. We therefore find no abuse of discretion in admitting the evidence.[21]

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[21] We note that Thevis' statements also could be considered party admissions, excepted from the hearsay rule under Fed.R.Evid. 801(d)(2). The trial court, however, ruled the conversation was not a party admission, and because we have upheld the trial court's theory of admissibility, we need not decide if the conversation in fact constituted a party admission.

4. Statements Concerning the Witness Protection Program

The trial court also permitted the government to introduce testimony that Underhill had feared Thevis would kill him and was preparing to enter the government's witness protection program. The court limited the jury's consideration of this evidence to explaining both Underhill's actions before his death and the government's failure to depose him. The court also instructed the jury in its final charges "to draw no inferences unfavorable to the defendants from the fact that government witnesses had been placed in the witness protection plan." Appellants contend that the probative value of this evidence is substantially outweighed by the unfair prejudice which could result from the jury inferring that because government officials placed Underhill in the witness protection program, his fear Thevis might kill him must have been true.

Although we agree with this court's statement in *United States v. Partin*, 552 F.2d 621, 644-45 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1979), that references to the witness protection program "must be handled delicately" and that the prosecution should not be permitted to exploit any prejudice, we again find that the probative value of this evidence was relatively high. It provided explanations for the government's failure to depose Underhill as well as a context for the jury to interpret Underhill's actions prior to his death. Nor do we find that the prosecution took unfair advantage of the references to the program. The trial court's limiting instruction, moreover, reduced the risk of unfair prejudice. We find no abuse of discretion in the admission of this evidence.

5. Exclusion of the Frame-Up Evidence

One of the theories of the defense at trial was that the FBI had conspired to frame Thevis by suborning perjury and false evidence. William O. Rhodes testified that Un-

derhill and FBI agent Paul King had collaborated to procure Rhodes' false testimony in the separate trial of Gilbert Deitch, a lawyer who had worked for Thevis.[22] Robert Frazier, a deputy United States Marshal, testified that Underhill had said King was trying to get him to lie to frame Thevis. To bolster its spoilation theory, the defense offered the testimony of John Reynolds, the FBI polygraph examiner, that Rhodes had failed polygraph examinations relating to his allegedly procured anti-Thevis testimony; the defense also offered Rhodes' own testimony, as well as that of Reynolds, that agent King was aware of these failures. In addition, the defense offered the testimony of Michael Clutter, an attorney who also had worked for Thevis, to corroborate Rhodes' charge that Deitch had been tried on perjured testimony with the knowledge of government officials. The trial court excluded Clutter's and Reynolds' testimony, and that part of Rhodes' testimony relating to the polygraph examination. The court concluded that because the probative value of the evidence was slight, while the risk of prejudice and jury confusion was high, Fed.R.Evid. 403 mandated exclusion. Appellants contend this ruling constituted reversible error.

We disagree. In contrast to the government proffers discussed above, which were highly probative of key facts, the defense offer concerned the conduct of government officials in a wholly separate trial. Rhodes' testimony was admissible only because it tended to impeach Underhill and agent King. Thus the proffered evidence was marginally probative as tending to substantiate Rhodes' credibility, but did not directly attack the evidence offered in this trial. On the other hand, the danger of prejudice and confusion of the jury was relatively high. Although the polygraph evidence was offered ostensibly to show knowledge on the part of agent King, its relevance to the

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[22] Deitch was charged along with Thevis and others in the original indictment. His trial was severed, and he was acquitted.

frame-up theory was almost inextricably tied to the reliability of polygraph results as substantive evidence. The danger was great that the jury would have inferred agent King participated in a frame-up because he knew about the polygraph results which by themselves accurately showed Rhodes lying, rather than because King merely believed Rhodes was lying. Thus the danger was substantial that the jury would rely on the polygraph results for their truth, rather than only as evidence of King's state of mind. Clutter's testimony, moreover, related to an entirely different trial, and did not substantiate Rhodes' charge that the government was offering perjured testimony in this case. Against this background we cannot say that the trial judge abused his discretion in excluding the proffered testimony.

C. *Other Evidentiary Rulings*

1. Use Immunity for Defense Witnesses

Appellants filed a pre-trial motion seeking judicial use immunity for George Thevis,[28] father of appellant Michael Thevis. They advised the court that George Thevis' testimony was crucial to the defense, but that he would invoke the fifth amendment if called to testify. The court permitted the defense to proffer George Thevis' expected testimony in *camera, ex parte*. As summarized by the appellants:

> George Thevis would have testified that he was with Thevis and Hood on October 25, 1978, from 11:00 a.m. to 11:40 a.m., at the Journey's End Motel. Hood and George Thevis then left Thevis for about twenty minutes. Appellant Thevis was still at the motel

[28] Thevis' pre-trial motion requested immunity for several witnesses in addition to George Thevis. On appeal, however, appellants contest only the denial of immunity to George Thevis. Appellants, moreover, have abandoned all theories of immunity raised at trial (including a Sixth Amendment compulsory process argument) other than the due process argument.

when they returned. The three of them stayed together until about 1:00 p.m. George Thevis refused to testify because of potential prosecution for "harboring" his son, who was then an escaped prisoner.

The trial court held that it lacked authority to grant immunity to any witness. Before this court, appellants concede that the court lacked statutory authority to grant immunity, *see United States v. Smith*, 436 F.2d 787 (5th Cir.), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971); they contend, however, that a defendant's due process right to a fair trial gives trial courts inherent authority to confer use immunity. Appellants' due process argument subdivides into two parts. First they claim that because George Thevis' testimony was exculpatory and unavailable from any other source, due process requires immunity to preserve the integrity of the truthfinding function. Second they urge that the government's granting immunity to its witnesses while denying immunity to George Thevis skewed the evidence against appellants and denied them a fair trial.

The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question whether judicial use immunity is necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit, in *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) held that such immunity is available in certain circumstances.[24] On the other hand, the Seventh,

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[24] In *Smith*, the defendant requested immunity for an exculpatory witness who was under the jurisdiction of the juvenile authorities of the Virgin Islands Attorney General. That office offered the witness immunity on the condition (prompted by prosecutorial courtesy) that the United States Attorney consent. For unexplained reasons, this consent was refused. The Third Circuit held that judicial use immunity was available when: (1) immunity was properly sought in the district court; (2) the witness is available

Eighth and District of Columbia Circuits have held that such immunity is unavailable. *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1976), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977); *United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1976); *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *Earl v. United States*, 361 F.2d 531, 534-35 (D.C.Cir. 1966), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967) (dealing with transactional immunity). The remaining circuits which have addressed the issue have denied immunity in the specific cases before them, but left open whether immunity would ever be available. *United States v. Turkish*, 623 F.2d 769, 771-79 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981); *United States v. Lenz*, 616 F.2d 960, 962-64 (6th Cir.), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980); *United States v. Klauber*, 611 F.2d 512, 517-20 (4th Cir. 1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976).

The Fifth Circuit has not explicitly determined whether due process may require a court to grant a defense witness use immunity.[25] We conclude, however,

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to testify; (3) the proffered testimony is both essential and clearly exculpatory; and (4) no strong governmental interests countervail against an immunity grant.

[25] No Fifth Circuit case has upheld a grant of immunity by a trial court, and our cases have strongly suggested, without specifically deciding, that courts lack such power under any circumstances. *E.g., United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. D'Apice*, 664 F.2d 75 (5th Cir. 1981). *D'Apice* specifically did not rule on whether the due process rights of a defendant might compel court-granted use immunity, but did hold that courts otherwise have no inherent power to grant immunity. *Herbst* involved constitutional claims, but the court held that in absence of a specific proffer of the testimony for which the immunity was requested, the record was insufficient to reach the constitutional issues.

after reviewing the various circuit opinions and conflicting policy arguments, that district courts may not grant immunity to defense witnesses simply because that witness has essential exculpatory information unavailable from other sources. As noted by the Second Circuit in *Turkish, supra,* the two major arguments against granting such judicial use immunity are that the immunity decision would carry the courts into policy assessments which are the traditional domain of the executive branch, and that the immunity would be subject to abuse.

We find these arguments persuasive, and agree that the immunity decision requires a balancing of public interests which should be left to the executive branch. While a grant of use immunity theoretically does not improve the legal position of the person immunized, in that he still can be prosecuted for his crime, in practice the burden placed on the government to prove that any evidence obtained against the immunized suspect is not tainted by the suspect's statement can significantly impair future prosecutions.[26] As the Second Circuit observed, "[C]onfronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function." *Turkish, supra,* at 776. *See id.* at 779 (Lumbard, J., concurring in part and dis-

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[26] *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) held that the government has a "heavy burden" to prove that its evidence has not been tainted by the immunized testimony. If the criminal investigation is complete prior to the immunity grant, then immunity raises few problems. In the common situation in which the investigation is continuing, however, immunity may significantly interfere with the presentation of crucial evidence obtained after the immunity grant unless the prosecution takes such extraordinary steps as to arrange for a new team of prosecutors, totally unfamiliar with the case, to continue the investigation. For smaller prosecutors' offices, such measures may be impossible given the staff and financial resources available.

senting in part). An immunity decision, moreover, would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pre-trial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial. *Id.*

Nor are we convinced that any safeguards imposed on the grant of judicial use immunity adequately reduces the risk of abuse by co-defendants, co-conspirators, friends, or employees.[27] Whatever may be gained in fairness in a particular trial in which true exculpatory evidence may be obtained only through judicial use immunity, therefore, may well be lost through the subsequent effect of abuse on the integrity of the judicial process as a whole. Finally, we note that the fifth amendment privilege is not the only one which may suppress probative evidence from the judicial process; crucial facts, for example, also may be shielded from disclosure by the attorney-client or doctor-patient privilege. Although abrogating the fifth amendment privilege through general use immunity for exculpatory testimony may conflict less with important public interests than abrogating these other privileges, we conclude that the potential interference is nevertheless great enough that the legislature, rather than the courts, should decide on such a course.

Appellants' second argument, that governmental abuse of the immunity process might warrant judicially-

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[27] The incentive for abuse is strong given that the witness, because of immunity, is in no worse a legal position for having testified, and because of the heavy burden on the government to prove lack of taint, the witness in practice may improve his legal position.

Nor are we convinced that perjury prosecutions are an adequate deterrent. Successful perjury prosecutions are not common, and in many cases the penalty for the substantive crime will far surpass perjury penalties.

compelled use immunity, presents a more compelling case. Some of the courts rejecting a general due-process-based use immunity for exculpatory testimony have nevertheless indicated that governmental abuse might present a different situation. *E.g., Klauber, supra*, at 517-19 (distinguishing abuse cases); *Earl, supra*, at 534 n.1. Two federal cases which granted immunity, moreover, arguably involved abuse situations. *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (government, after previously showing no interest in prosecuting potential witness, threatened prosecution after witness decided to testify for defendant); *United States v. De Palma*, 476 F.Supp. 775 (S.D.N.Y. 1979) (government's choosing among potential defendants, granting immunity to two for their testimony against a third). Finally, Supreme Court precedent supports the proposition that the government cannot so abuse its discretion as to render the trial unfair. *E.g., Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (government has a general duty to disclose exculpatory evidence).

We, however, need not decide in this case if a court may grant immunity when it finds government abuse,[28] because we conclude that no abuse occurred in the prosecution of Michael Thevis. George Thevis' testimony was offered to prove a specific point at issue in the trial: whether Michael Thevis and Bart Hood were present at the scene of the Underhill-Galanti murders. The government evidence placing Thevis and Hood at the scene consisted entirely of non-immunized testimony;[29]

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[28] Although we need not decide today exactly what circumstances might constitute government abuse of the immunity process, we caution that a trial is not a "symmetrical proceeding" which requires a court to grant the defendant's witnesses immunity because the government uses immunized witnesses. *See United States v. Turkish*, 623 F.2d 769, 774-75 (2d Cir. 1980).

[29] The government presented the eye-witness testimony of two plane pilots placing Thevis and Hood at the scene, as well as the testimony of Thevis' former cellmate that Thevis had confessed to the Underhill-Galanti murders. See part I of this opinion, *supra*.

hence, no abuse occurred. We conclude, therefore, that under the circumstances, the trial court did not err in refusing to grant George Thevis use immunity.

2. The Buckhout Testimony

At trial the government offered the testimony of two experienced airplane pilots who identified Thevis and Hood as men they had seen at Underhill's property around the time Underhill and Galanti were murdered. The defense attempted to counter this evidence through the testimony of Dr. Robert Buckhout, an expert on the subject of eyewitness identification. Specifically, Buckhout offered to testify that the ability of airplane pilots to make eyewitness identifications is not greater than that of other persons. The trial court excluded the proffered testimony, concluding that the subjects of perception, memory, and identification were within the expertise of the jury and therefore the probative value of the evidence was substantially outweighed by the possibility of prejudice emanating from this "expert" testimony. Appellants claim this ruling was error.

Rule 702, Fed.R.Evid., permits expert testimony when the trial court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." As with all evidentiary rulings, the admission of such testimony is addressed to the sound discretion of the trial court. *United States v. Lopez*, 543 F.2d 1156 (5th Cir. 1976). We find no abuse of discretion in the trial court's ruling. Buckhout did not comment specifically on the identification made by the two government witnesses, but instead testified generally as to problems with eyewitness identification and that pilots *as a group* were not better equipped than ordinary witnesses to make identifications. To admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evi-

dence. Moreover, we conclude, as did the trial judge, that the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through commonsense evaluation. Our conclusion is supported by other circuits' uniform approval of excluding testimony exactly like Buckhout's. *United States v. Fosher*, 590 F.2d 381, 382-84 (1st Cir. 1979) (Buckhout's specific testimony excluded); *United States v. Watson*, 587 F.2d 365, 368-69 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1055, 59 L.Ed.2d 95 (1979); *United States v. Brown*, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1977); *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974), *rev'd on other grounds sub nom. United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (Buckhout's specific testimony excluded); *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973); *United States v. Collins*, 395 F.Supp. 629 (M.D.Pa.), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975) (Buckhout's specific testimony excluded). *See also, United States v. Webb*, 625 F.2d 709, 710-11 (5th Cir. 1980) (trial court did not err in excluding expert testimony that defendant lacked "propensity to commit a violent act"); *United States v. Sims*, 617 F.2d 1371, 1374-75 (9th Cir. 1980) (trial court did not err in failing to appoint psychologist to assist defense through testimony on the unreliability of eyewitness identification).

3. The McMurray Identification of Hood

As part of its case on Count Ten the government introduced the testimony of Milton E. McMurray who identified Thevis, Evans and Hood as the persons he had seen together shortly after the Underhill-Galanti murders. McMurray did not come forward as a witness until September 5, 1979, when he advised prosecutors and the FBI that he had seen Thevis, Evans, and an unidentified man together in Evans' car around 12:10 and 12:25 p.m. the

day of the Underhill-Galanti murders. McMurray described the unidentified man, but was not shown a photospread, lineup, or otherwise asked to identify him as Hood. On September 7, McMurray, was interviewed by prosecutors at the United States Courthouse in Rome, Georgia, prior to testifying at trial; after the interview, he left for breakfast. Hood, meanwhile, had arrived early at the courthouse and was sitting with his wife on a bench in the hallway when McMurray returned. McMurray saw Hood and identified him to prosecutors as the man he had seen with Thevis and Evans. Hood now claims that this encounter was staged by prosecutors and violated his sixth amendment right to counsel. In addition, Hood asserts that even if the encounter did not violate his sixth amendment rights, it violated due process because it was unduly suggestive and failed to meet the tests of reliability set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

We reject both contentions. The record is devoid of any evidence that the prosecutors staged the encounter between McMurray and Hood; hence we conclude that the encounter was a purely inadvertent one which did not violate the sixth amendment. The parties do not dispute that Hood enjoyed a sixth amendment right to counsel at this stage of his criminal prosecution. *See Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *Lomax v. Alabama*, 629 F.2d 413, 414-15 (5th Cir. 1980), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1712, 68 L.Ed.2d 205 (1981). In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the Supreme Court held that an accused was entitled to counsel at a post-indictment encounter [30] to help avoid possible abuses in the identification procedure which could rob the defendant of a fair trial. *Id.* at 228-39, 87 S.Ct.

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[30] The court stated that its rationale applied to lineups, "showups", or one-on-one confrontations. *Wade*, 388 U.S. at 229, 87 S.Ct. at 1933.

at 1933-39. *See Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The rationale stated by the Court was that:

> the confrontation compelled *by the State* between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.

Wade, supra, at 228, 87 S.Ct. at 1933 (emphasis added).

The Court's concern in these cases is with the misuse of identification procedures by the adverse party (prosecutor or police) which can result in a misidentification and erroneous conviction. Having opposing counsel present serves as a deterrent to such misuse and helps the defendant fully exercise his rights at trial by effectively reconstructing any unfairness in the identification procedures. *Id.* at 230-36, 87 S.Ct. at 1934-37. Consequently when an identification does not implicate the adversary process, the deterrent effect of counsel is unnecessary and the risk of prejudice negligible. A purely inadvertent meeting between the witness and the defendant does not involve any danger that the adverse party will abuse the identification process. Moreover, no "procedures" exist for defense counsel to reconstruct at trial. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) (holding that risks inherent in photographic displays did not warrant assistance of counsel). *See Gilbert v. California*, 388 U.S. 263, 265-67, 87 S.Ct. 1951, 1952-54, 18 L.Ed.2d 1178 (1967) (taking of handwriting exemplars did not require assistance of counsel because of "minimal risk that the absence of counsel might derogate from [a] fair trial"). We conclude, therefore, that the absence of counsel at a purely inadvertent meeting of a witness and defendant does not constitute a

violation of the right to counsel.[31] *See United States v. Gentile*, 530 F.2d 461 (2d Cir.), *cert. denied*, 426 U.S. 936, 96 S.Ct. 2651, 49 L.Ed.2d 388 (1976) (dangers which prompted counsel requirement in *Wade* are absent in inadvertent identification).

Finding no sixth amendment violation, however, does not end the inquiry. As the Supreme Court noted in *Kirby v. Illinois*, 406 U.S. 682, 690-91, 92 S.Ct. 1877, 1882-83, 32 L.Ed.2d 411 (1972), a court must scrutinize any pretrial confrontation for possible due process violations. The basic standard for due process violations is whether the identification procedure creates "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). *See Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-98, 93 S.Ct. 375, 380-81, 34 L.Ed.2d 401 (1972). Accordingly, this circuit has adopted a two-step analysis of the due process issue:

> First, as a threshold inquiry, the Court must decide whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of identification and triggers closer scrutiny by the Court to determine whether such a procedure created a substantial risk of misidentification.

Allen v. Estelle, 568 F.2d 1108, 1112 (5th Cir. 1978). *See Preacher v. Estelle*, 626 F.2d 1222, 1223 (5th Cir. 1980), *cert. denied*, 450 U.S. 930, 101 S.Ct. 1389, 67 L.Ed.2d 362 (1981).

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[31] A contrary rule would violate common-sense. Obviously, attorneys cannot follow their clients or witnesses around twenty-four hours a day in order to prevent any chance meetings which could create sixth amendment problems.

We conclude that the identification at issue here was not unnecessarily suggestive. *See United States v. Davis*, 487 F.2d 112, 122 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974) (observation of defendant by witness immediately prior to trial did not violate due process). The purely inadvertent meeting contained no hint of suggestiveness. The prosecutor did not show McMurray pictures of Hood or ask him to view Hood in a lineup. The prosecutor did not present Hood to McMurray and ask for an identification. Nor did the prosecutor even ask McMurray if he recognized the man in the hallway. Moreover, nothing about Hood suggested that he was a criminal defendant in this case. He was not handcuffed, for example, or standing alone among uniformed police officers. Far from being suggestive and unreliable, the spontaneous identification that resulted from McMurray's inadvertent meeting with Hood "might be said to emphasize the witness' reliability, rather than the reverse." *Allen v. Moore*, 453 F.2d 970, 974 (1st Cir. 1970), *cert. denied*, 406 U.S. 969, 92 S.Ct. 2422, 32 L.Ed.2d 668 (1972). Our conclusion is supported by numerous cases from other circuits holding that identifications resulting from inadvertent meetings do not violate due process. *E.g., United States v. Di Stefano*, 555 F.2d 1094, 1101-1102 (2d Cir. 1977); *United States v. Colclough*, 549 F.2d 937, 941-42 (4th Cir. 1977); *United States v. Freie*, 545 F.2d 1217, 1223-24 (9th Cir.), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1645, 52 L.Ed.2d 356 (1976); *United States v. Neverson*, 463 F.2d 1224, 1230-31 (D.C.Cir. 1972).[22]

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[22] We do not hold, however, that an inadvertent encounter may never form the basis for due process relief. In *Green v. Loggins*, 614 F.2d 219 (9th Cir. 1980) the court held that an inadvertent encounter was nevertheless unnecessarily suggestive. In *Green*, a witness to a shooting went to a local police station to seek protective custody despite warnings that he was to have no contract with police until after an upcoming lineup. The station-house that the witness went to happened also to be the same one in which

IV. Miscellaneous Claims of Error

A. *Errors in the Charge to the Jury*

1. The "Alter Ego" Instruction

Appellant Global claims as an additional ground of appeal error in the trial court's "alter ego" instruction to the jury. At the time the trial judge admitted the Underhill grand jury testimony, he instructed the jury that the evidence was admissible only against defendant Thevis. Later in the trial the government presented the testimony of Rodney Smith, a former Thevis employee and cellmate, to the effect that in 1977 Thevis claimed he still controlled Global. The court ruled that this evidence was inadmissible to prove that an agency relationship existed between Global and Thevis, and until other evidence proved the agency relationship, the Smith testimony constituted inadmissible hearsay as to Global. Nevertheless, in his final charge to the jury the judge instructed that if the jury found beyond a reasonable doubt that an agency relationship existed between Thevis and Global, or that Global was the "alter ego" of Thevis, it could consider against Global the acts, declarations,

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the defendant was being held. The witness was placed in a holding cell; a short time thereafter the defendant was placed in the same cell because he had been conferring with his attorney, and jail policy prohibited returning an inmate to his cell during a meal period. Some time later a booking officer asked both men their names, and the witness recognized the defendant. The court concluded that three aspects of the encounter made it unnecessarily suggestive: the setting strongly suggested to the witness that the defendant had been accused of a crime; the mention of the defendant's name immediately identified the defendant as the suspect in the witness' trial; and finally "the encounter was a result of the state's negligent exercise of its control over both the witness and the accused." *Id.* at 223. We find none of these factors present in the present case, and hence distinguish *Green*; we, however, express no opinion as to whether we agree with the result in that case.

or knowledge of Thevis.[33] Global objected to this instruction at the charge conference, but failed to pre-

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[33] The relevant instruction read:

Global Industries, Inc., is a defendant in this case. It is a corporation. A corporation is a legal entity or person, and a corporation may be found guilty of a criminal offense.

A corporation, of course, may only act through natural persons who are known as its agents and in general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declaration and omissions.

Similarly, an act of an agent may be attributed to the corporation if that act done by the agent is done with the purpose of benefiting the corporation.

Whether the acts of individuals are to be attributed to the corporate defendant is a question of fact for you to decide just as other fact questions in this case.

While the acts, declarations or omissions of natural persons are admissible against those individuals, they are admissible against the corporate defendant only should you find as a matter of fact beyond a reasonable doubt that the acts, declarations or omissions were performed within the scope or authority of the agent or were performed by the agent for the purpose of benefiting the corporation, which acts the corporation had knowledge of. A corporation may also be found guilty of a criminal offense if the individual actually performing the act is the alter ego of the corporation.

Taken literally, alter ego means "second self"; it is the legal theory whereby the separate legal personalities of an individual and a corporation are disregarded, because they are considered to be merged as a matter of law.

Before you could find that defendant Michael G. Thevis was the alter ego of defendant Global Industries, Inc., and the acts of one are the acts of the other, you would have to find beyond a reasonable doubt that defendant Michael G. Thevis was a controlling stockholder of Global Industries, Inc.; that he disregarded its separate corporate entity; that he utilized the corporation as a conduit for his personal business; and that the separate personality of the defendant Michael G. Thevis and defendant Global Industries ceased to exist.

If you determine beyond a reasonable doubt that the defendant Michael G. Thevis was the alter ego of defendant Global In-

serve its objection after the court delivered its charge. Global now contends that the charge constituted reversible "plain error." We disagree.

Under Fed.R.Crim.P. 30, objections to jury instructions not timely made are waived unless the instruction constitutes "plain error." *E.g., United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981). "The obvious purpose of this provision is to inform the trial judge of possible errors so that he may have an opportunity to correct them." 8A J. Moore, Moore's Federal Practice ¶ 30.04 at 30-14 to 30-15. The "plain error" exception will not be invoked unless "the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice," *Varkonyi, supra*, or "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Adams*, 634 F.2d 830, 836 (5th Cir. 1981).

In our judgment the charge did not constitute "plain error" under this standard. The Fifth Circuit has held that the trier of fact may disregard the corporate entity when the controlling shareholder uses the corporation purely as a conduit for personal business. *Baker v. Raymond International, Inc.*, 656 F.2d 173, 179 (5th Cir. 1981). Whether to disregard the corporate entity for that reason is a question of fact. See *Talen's Landing, Inc. v. M/V Venture, Inc.*, 656 F.2d 1157, 1160 (5th Cir. 1981). The challenged instruction substantially con-

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dustries, Inc. as a question of fact, then you may attribute the acts and knowledge of defendant Michael G. Thevis to defendant Global Industries, Inc. I instruct you that you would not be authorized to convict defendant Michael G. Thevis or Global Industries, Inc. of any criminal offense as set forth in Counts One or Two of the indictment based merely upon the fact that Underhill was an employee of Thevis at the time Underhill committed a crime, if you find from the evidence that Underhill did.

veyed this circuit's substantive law of alter ego. *See Baker, supra,* at 180-81.[34]

Nevertheless, Global argues that the instruction constituted "plain error" for three reasons. First, Global asserts that the challenged instruction confused the jury as to what evidence was admissible against Global, in light of the trial court's earlier admonition not to consider the Underhill evidence against the corporation. While we agree that the charge may have been more precise, we do not think that the charge as given resulted in a "likelihood of a grave miscarriage of justice," especially when any ambiguity in the charge could have been corrected had an objection properly been made.

Global's second "plain error" argument is more complex. Global asserts that without the Underhill testimony admitted against the corporation as substantive evidence of guilt, the corporation's conviction on the RICO charges would have to be reversed due to insufficient evidence. The Underhill testimony, however, was admitted against Thevis only under the theory that he had waived his sixth amendment confrontation rights and his hearsay objection by killing Underhill. For the evidence to be admissible against Global, a similar waiver would be necessary; without it, considering the Underhill testimony against Global would violate Global's confrontation rights.[35]

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[34] In *Baker* this court delineated the appropriate context of an alter ego charge. While the charge given in this case failed to include certain factors listed in *Baker*, we do not find the variance so substantial as to render the charge "plain error." We would suggest, however, that in the future "alter ego" instructions follow the standards set forth in *Baker*.

[35] The sixth amendment guarantees apply generally to an "accused"; a corporation which is a defendant at trial is an "accused" within the meaning of the amendment and enjoys the protection afforded by it. *See United States v. Rad-o-Lite*, 612 F.2d 740 (3d Cir. 1979) (holding that corporations enjoy a sixth amendment

In his order denying Global a judgment of acquittal or a new trial, the trial judge conceded that the instruction permitted the jury to consider the Underhill testimony against Global if it found that an agency or alter ego relationship existed between Thevis and Global. In its opinion relating to the admission of the Underhill testimony, however, the trial court specifically stated that no evidence connected Global to the Underhill murder; hence Global did not directly waive its confrontation rights. *United States v. Thevis*, 84 F.R.D. 57, 72 (N.D. Ga.1979). The only other way in which Global's rights could be deemed waived is if Thevis' waiver could have been imputed to Global under an agency or alter ego theory; for one to have imputed Thevis' waiver to Global, however, the evidence would have had to show that an agency or alter ego relationship existed *at the time of the Underhill murder*. Global asserts that because the instruction failed to focus on the proper time frame, it permitted the jury to convict without having first found a proper waiver, thus violating its confrontation rights. Global contends, moreover, that no evidence existed to connect Thevis with Global at this crucial time.

While we agree that the trial judge's failure to specifically pinpoint the crucial time at which the alter ego relationship had to exist rendered the instruction objectionable,[36] this deficiency did not constitute "plain error."

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right to counsel); *United States v. R. L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971) (corporations have sixth amendment right to jury trial).

[36] By permitting the jury to consider the Underhill statements against Global after finding an alter ego relationship, the instruction also erroneously submitted the waiver issue to the jury. Because a finding of waiver was a predicate to the admissibility of the Underhill statements, the waiver issue was one for the trial court to decide in accordance with the stringent standards set out in part IIIA of this opinion. *Cf. United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61

A fair interpretation of the instruction is that it required the jury to determine whether during the *entire period* Global was the alter ego of Thevis. Thus the jury's guilty verdict against the corporation amounted to a finding that Thevis at no time properly observed the separate corporate identity. The evidence, moreover, supported the jury's finding. Viewing Thevis' sham sale of the pornography corporations to his secretary, his boast to Smith that he controlled the business from jail after this "sale", and the pattern of Thevis' criminal activity on behalf of the business revealed by various government witnesses [37] in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the jury was entitled to infer that Thevis historically had disregarded the corporate entity and continued to do so throughout the period in question, including the Underhill murder. Hence we hold that the instruction, while objectionable, was not so erroneous as to require reversal under the "plain error" standard.

L.Ed.2d 283 (1979) (trial court alone must decide admissibility of co-conspirators' statements). Nevertheless, submission of this issue to the jury did not constitute plain error inasmuch as the jury was required to find the existence of alter ego beyond a reasonable doubt, in contrast to the clear and convincing standard we approved for a judge-made waiver decision.

[37] Although the trial court excluded the Smith testimony for the purpose of proving agency under the settled rule that an agency may not be proven through the acts or declarations of the purported agent, he made no ruling as to the admissibility of the evidence on the issue of alter ego. Unlike agency, a substantial part of the proof of the existence of an alter ego relationship consists of evidence of how the person allegedly controlling the corporation treated the corporate entity. *See, e.g. Baker v. Raymond International, Inc.*, 656 F.2d 173, 179-81 (5th Cir. 1981). In this case, the government's theory throughout trial was that *Thevis* had disregarded the corporate entity such that alter ego theory applied. Hence, a key issue was whether Thevis had treated Global as a separate entity or, in contrast, as purely a conduit for his

Global's final "plain error" argument is that the instruction, by permitting the jury to consider as substantive evidence of guilt evidence which the trial court initially excluded as to the corporation, unfairly surprised the corporation and denied it effective confrontation of witnesses and due process. We find this argument specious. The alter ego theory of liability was pursued by the government throughout the trial, and Global's counsel was well aware of the potential impact of the theory on the admissibility of evidence.[38] Hence the instruction neither unfairly surprised Global nor denied it any constitutional rights.

2. The Instruction to Decide Count Ten First

In its final instructions, the court charged the jury to deliberate first on Count Ten, the Underhill-Galanti murder count; if and only if they found Thevis guilty on that count, could they then consider the truth of the Underhill statements against Thevis as to Counts One and Two. Appellants requested this instruction, yet nevertheless contend on appeal that the instruction constituted plain error by giving the jury an artificial incentive to convict on Count Ten. According to appellants, the evidence of Thevis' guilt on Counts One and Two was plainly insufficient without Underhill's testimony. Thus, they continue, if the jury desired to convict Thevis on Counts One and Two, it could not do so unless it first found him guilty of Count Ten.

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personal business. Any evidence admitted against Thevis, therefore, could properly be considered by the jury in assessing whether Thevis had so disregarded the corporate entity that he and the corporation were in fact one "person."

[38] In closing argument, for example, Global's counsel conceded that the corporation could be guilty only if Thevis was guilty; counsel then spent his entire closing argument attempting to refute Thevis' guilt.

We find this assertion highly speculative. The instruction, moreover, actually served to benefit the defendants by providing a doublecheck on the trial court's earlier waiver ruling.[39] We therefore need not decide if the instruction constituted error;[40] we are satisfied that it did not constitute reversible "plain error" under the precedents cited above.

B. *The Request for Severance*

Appellants Evans and Hood contend that the trial court abused its discretion in refusing to grant their motion under Fed.R.Crim.P. 14 to sever Count Ten from the remaining counts. "The test in this circuit for reviewing the denial of a severance is that the defendant must be unable to obtain a fair trial without severance and must demonstrate compelling prejudice against which the trial court will be unable to afford protection." *United States v. Swanson*, 572 F.2d 523, 528 (5th Cir.), *cert. denied*, 439 U.S. 849, 99 S.Ct. 152, 58 L.Ed.2d 152 (1978). *See United States v. Grapp*, 653 F.2d 189, 192-93 (5th Cir. 1981); *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980). The trial court denied the pre-trial severance motions of Evans and Hood, finding that the jury could "reasonably be expected to separate the indictments or the defendants and to evaluate the evidence properly and individually against each." *United States v. Thevis*, 474 F.Supp. 117, 132 (N.D.Ga.1979) (quoting *United States v. Harris*, 458 F.2d 670, 673 (5th Cir.), *cert. denied*, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). In its pre-trial severance order, the court noted its continuing duty at all stages of the trial to grant a severance if prejudice did appear, and

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[39] See part III A of this opinion, *supra*.

[40] *Cf. United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979) (trial judge alone must decide admissibility of co-conspirators' statements).

stated "this Court remains ready to enter such an order, if it becomes apparent that a jury is incapable of isolating the proof among the several defendants and charges." 474 F.Supp. at 133.

We find that such prejudice never materialized, and that the trial court acted within its discretion in refusing to grant Evans and Hood's motions for severance. This was not a case with an extraordinarily large number of defendants in which the jury might have difficulty keeping the evidence separated as to each defendant. Moreover, the trial court was extremely careful throughout the trial to instruct the jury that the racketeering evidence against Thevis and Global had no connection with Evans and Hood. At the beginning of the government's presentation of the RICO evidence, the trial court specifically instructed the jury that the trial was entering a new phase and that none of the racketeering evidence would pertain to Evans and Hood. We agree with the trial court that Evans and Hood did not show the "compelling prejudice" necessary to warrant a discretionary severance under Rule 14.

C. *The Sufficiency of the Evidence Claims*

1. Evans and Hood

Both appellants Evans and Hood claim that the evidence was insufficient to convict them on Count Ten. They do not deny that they helped Thevis after his escape from jail and are therefore guilty of harboring a fugitive; rather, they emphatically deny that they knew Thevis was planning to silence Underhill. Without this knowledge, they argue, they cannot be found guilty of the Count Ten conspiracy.

We reject appellants' contentions. For a defendant to be convicted of a conspiracy, the prosecution must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that he intended to

join or associate himself with the objectives of it. *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.), (en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). *See United States v. Bland*, 653 F.2d 989, 996 (5th Cir. 1981). Participation in a conspiracy, however, need not be shown by direct evidence; a jury may infer a common purpose or plan from a "development and a collection of circumstances." *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). *See United States v. Marx*, 635 F.2d 436, 439 (5th Cir. 1981) ("Defendant's assent to a conspiracy may be inferred from acts which furthered the conspiracy."), *United States v. Malatesta, supra*, at 1381.

The role of an appellate court in reviewing the sufficiency of the evidence is strictly limited. Whether for conspiracy or other crimes and whether the evidence is circumstantial or direct, *see United States v. Fox*, 613 F.2d 99, 101 (5th Cir. 1980), the test for reviewing sufficiency is that a jury verdict "must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *Hamling v. United States*, 418 U.S 87, 124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974) (quoting *Glasser, supra*, 315 *U.S.* at 80, 62 S.Ct. at 469). *See Malatesta, supra*, at 1381-82. This court has interpreted the "substantial evidence" test as evidence which would permit a reasonable jury to find guilt beyond a reasonable doubt, *United States v. Fox, supra*, at 101, or, alternatively, evidence such that a reasonable jury could conclude was inconsistent with every reasonable hypothesis of innocence. *United States v. Garcia*, 655 F.2d 59, 62 (5th Cir. 1981); *United States v. Berry*, 644 F.2d 1034, 1039 (5th Cir. 1981).

We find that the evidence against Evans and Hood met this standard. The record showed that Evans and Hood not only harbored Thevis but took a number of other actions which, viewed in the light most favorable to

the government, indicated they were aware of the conspiratorial purpose to silence Underhill. Both Evans and Hood contacted a cousin about silencers for a .38 pistol and a 30.06 rifle. The day before the murder Evans visited a former associate real estate broker to inquire about the Underhill property, despite earlier having told the associate not to have anything to do with this property because of Underhill's involvement with Thevis. Later that same day Hood ran a license check on the car Underhill was driving. The jury could reasonably conclude that these actions and the other activities of Evans and Hood related in part I of this opinion were inconsistent with any hypothesis of innocence, including the "mere" harboring of Thevis.

2. Global

Global claims that because the trial court's alter ego instruction constituted reversible "plain error,"[41] the Underhill testimony could not be considered as substantive evidence of guilt against it. Without this testimony, Global asserts, the evidence is insufficient to convict it of the RICO charges. As we have decided that the alter ego instruction was not plain error, the Underhill testimony properly could be considered against Global, and the evidence was sufficient to sustain the conviction.

V. Conclusion

In accordance with our decision we affirm the convictions of all defendants on all counts.

AFFIRMED.

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[41] See part IV A 1 of this opinion, *supra*.

APPENDIX C

UNITED STATES DISTRICT COURT
N. D. GEORGIA
ATLANTA DIVISION

Crim. A. No. 78-180A

THE UNITED STATES OF AMERICA

v.

MICHAEL G. THEVIS, GLOBAL INDUSTRIES, INC., WILLIAM ROSS MAHAR, ANNA JEANETTE EVANS AND ALTON BART HOOD

Oct. 8, 1979

ORDER

HAROLD L. MURPHY, District Judge.

Pursuant to the bench rulings of the Court, this order will set forth in detail the factual findings and legal analysis relied upon by the Court in admitting or denying the proffered testimony of Roger D. Underhill under Rule 804(b)(5), F.R.E.

Counts I and II set forth substantive and conspiracy violations of 18 U.S.C. § 1962 (Racketeer Influenced and Corrupt Organizations Act, "RICO"). Among the predicate acts set forth in the pattern of racketeering activity are: (1) the murder of Kenneth "Jap" Hanna on November 18, 1970; (2) the extortion of Joseph Anthony in March, 1971; (3) the arson of a competitor on September 18, 1972 in Fayetteville, North Carolina; (4) the fraudulent use of the mails in June, 1973; and (5) the murder of Jimmy Mayes on September 18, 1973. The government has offered the testimony of Roger Underhill contained in his grand jury testimony and F.B.I. "302" interviews as to each of those predicate acts.

The testimony was offered against each of the defendants as to Counts I and II: Michael George Thevis, Global Industries, Inc., and Fidelity Equipment Leasing Company, Inc.

Roger D. Underhill is unavailable as a result of his murder on October 25, 1978. In Count X, defendants Thevis and Fidelity along with other coconspirators are charged with violating Underhill's civil rights by murdering him to prevent his testimony in this case. *See*, 18 U.S.C. § 241; *United States v. King*, 587 F.2d 209 (5th Cir. 1979); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977).

In ruling on the admissibility of the proffered testimony, the Court has been called upon to resolve serious issues involving both evidentiary and constitutional dimensions. Procedurally, the government tried Count X first; after putting its evidence before the Court and jury as to that charge, it then proceeded to try the two RICO counts. Chronologically, the first predicate act was the murder of Kenneth "Jap" Hanna on November 13, 1970. Prior to the tender of the Underhill statements under Rule 804(b)(5), the government presented its evidence as to the Hanna murder in the presence of the jury. The case was then recessed for hearings outside the presence of the jury. In these hearings, which took three days, the defense presented evidence as to credibility, motive, interest, and bias of Underhill as well as evidence directed towards controverting the corroborating evidence which the government relied upon to reach the "circumstantial guarantees of trustworthiness" required by Rule 804(b)(5). Since the proffered testimony also raised the right to confrontation guaranteed by the Sixth Amendment, the Court gave the defendants an opportunity to present *in camera* their defense to Count X. The defendants accepted that offer, and the defense showing was considered prior to the

ruling on the admissibility of the proffered testimony of Underhill under Rule 804(b)(5). The Underhill statements as to the Hanna murder were then admitted into evidence.

As to the Underhill proffer on each of the other predicate acts, the procedure for reviewing the corroborating evidence was repeated and the general showing made as to Underhill's interest, credibility, bias, and motive was incorporated.

Preliminary questions of admissibility are addressed to the Court under Rule 104(a), and the proffered statements of Underhill under the aegis of Rule 804(b)(5) present three preliminary questions to the Court:

> (1) does each proffered statement satisfy the requirements of Rule 804(b)(5)?
>
> (2) does the admission of the proffered statement violate the right to confrontation guaranteed by the Sixth Amendment?
>
> (3) if the admissibility of the proffered statement raises a confrontation issue, has the defendant waived his right to confrontation?

The Court will analyze each proffered statement as to the first preliminary question before addressing the second and third issues in a manner applicable to all proffered statements which satisfy Rule 804(b)(5).[1]

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[1] The Court is aware that Rule 804(b)(5)'s requirement that admission of the statement be in "the interests of justice" necessarily incorporates the Confrontation Clause of the Sixth Amendment. *See, e.g., United States v. Bailey*, 581 F.2d 341, 350 (3rd Cir. 1978). Nonetheless, for analytical purposes, the Court will first focus on the evidentiary requirements before addressing the constitutional considerations since not all of the proffered statements satisfy the provisions of Rule 804(b)(5).

I

Rule 804(b)(5)[2] is the residual exception for application when the declarant is unavailable and the proffered testimony does not meet one of the traditional exceptions to the hearsay rule. The theory underlying both this rule and Rule 803(24) (residual application when declarant is available) was set forth by Judge Weinstein:

> It [the Supreme Court] recognized that not every contingency can be treated by detailed rules, that the hearsay rule has never been a closed system and should not be (for it would be presumptuous to assume that all possibilities and new developments have been foreseen), and that, in a particular case, hearsay evidence which does not fall within one of the exceptions may have greater probative value than evidence which does. 4 *Weinstein's Evidence* ¶ 803(24)[01] pp. 803-241, 242.

In essence, the residual exceptions incorporate the analysis of the Fifth Circuit holding in *Dallas County v. Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961). In that decision, the Fifth Circuit affirmed

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[2] Rule 804(b)(5) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

the trial court's decision to admit into evidence a 58-year old unsigned newspaper article reporting a fire as evidence that the fire occurred. Although the newspaper article did not fit any of the classic hearsay exceptions, the Court of Appeals later explained its decision in *Dallas County* as resting on the principle that "the primary criteria for permitting the introduction of otherwise inadmissible hearsay [are] elements of necessity and trustworthiness." *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1182 (5th Cir. 1975).

Under Rule 804(b)(5), six conditions must be satisfied prior to admission:

(1) the declarant must be unavailable;[3]

(2) the statement must have circumstantial guarantees of trustworthiness equivalent to the first four exceptions in Rule 804(b);

(3) the statement is offered as evidence of a material fact;

(4) the statement must be more probative on the point for which it is offered than any other evidence that the proponent reasonably can procure;

(5) introduction of the statement must serve the interests of justice[4] and the purposes of the Federal Rules;

(6) the proponent of the evidence to be offered must have given his adversary the notice required by the rule. *United States v. Bailey, supra*, at 346.

As to all proffers under Rule 804(b)(5), the Court finds that the declarant is unavailable, the statements are offered as evidence of a material fact, and that the requisite notice has been given. The remaining require-

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[3] "Death has been the most obvious and irreversible form of unavailability." 4 *Weinstein's Evidence*, ¶ 804(a)[01], p. 804-39.

[4] *See*, Part III, *infra*.

ments as to each proffer will be discussed individually in relation to the facts surrounding that proffer.

The first line of the defense is that the statements do not possess the equivalent circumstantial guarantees of trustworthiness contained in the other exceptions to Rule 804. Thus, the starting point for this analysis is to evaluate the inherent circumstantial guarantees of trustworthiness possessed by the bench mark exceptions, so that the standard against which the proffered statements are to be measured may be determined.

Rule 804(b)(1) exempts from the hearsay rule the generic class of "former testimony", its circumstantial guarantee of trustworthiness being that the "former testimony" has been subjected to the crucible of cross-examination. Rule 804(b)(2) exempts the "dying declaration" from the hearsay rule, because the circumstances of belief of impending death seem to obviate any motive on the part of the declarant to misstate the truth. More realistically, the dying declaration is admitted, because of compelling need for the statement rather than any inherent trustworthiness. Similarly, Rule 804(b)(3) (statement against interest) and Rule 804(b)(4) (statement of family or personal history) each contain circumstantial guarantees of trustworthiness, because the contents of the statements are such that they would not be made unless they were true.

The hallmark of these generic exceptions to the hearsay rule is that each is considered to have greater reliability than that possessed by ordinary hearsay. As Judge Mansfield noted in his dissenting opinion in *United States v. Medico*, 557 F.2d 309, 319 n. 1 (2d Cir. 1977), *cert. denied* 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 480 (1977): "The foundation for all hearsay exceptions is circumstantial trustworthiness in the absence of cross-examination."

The government seeks to demonstrate the circumstantial trustworthiness of the Underhill statements by rely-

ing on independent, corroborating evidence. *See, United States v. Ward*, 552 F.2d 1080, 1082-1083 (5th Cir. 1977), *cert. denied*, 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 119 (1977); *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. denied* 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1979); and *United States v. West*, 574 F.2d 1131 (4th Cir. 1978).

The defense contends, on the other hand, that while corroboration may be utilized to support a finding of circumstantial guarantees of trustworthiness, the decision must not be based on corroboration alone. As set forth in *United States v. Bailey*, *supra* at 349:

> Since the rule is designed to come into play when there is a need for the evidence in order to ascertain the truth in a case, it would make little sense for a judge, in determining whether the hearsay is admissible, to examine only facts corroborating the substance of the declaration. Such an analysis in effect might increase the likelihood of admissibility when corroborating circumstances indicate a reduced need for the introduction of the hearsay statement. We do not believe that Congress intended that 'trustworthiness' be analyzed in this manner.

Consequently, the defendants urge that the Court must inquire into the declarant's motive, interest, general credibility, and all other circumstances which affect his statement.

In the determination of whether a statement proffered under Rule 804(b)(5) has circumstantial guarantees of trustworthiness equivalent to the other exceptions, this Court will employ a two-part analysis. The first step will analyze the declarant and the circumstances surrounding his statement. This portion of the analysis will inquire into the declarant's relationship with the party against whom the statement is offered, and his motive to speak truthfully about the facts observed. The

nature in which the statement was given, and the declarant's opportunity to observe the episode set forth in the statement are also subjects of inquiry. *See, United States v. Bailey, supra* at 849; *United States v. Medico, supra*, 557 F.2d at 315; 4 *Weinstein's Evidence*, ¶ 803(24) [01], p. 803-247. Although the factors denominated above are not meant to be exclusive, the purpose of this analysis is to establish whether the statement itself manifests circumstantial guarantees of trustworthiness equivalent, at least, to the other Rule 804 exceptions. While the Court does not seek to limit its inquiry to the statement itself, it does note that with the exception of Rule 804(b)(3) (statements against penal interest) the other exceptions to Rule 804 are admitted without corroborating evidence, because the reliability of the statement itself has been judicially accepted without demand for independent corroboration.

The second part of the Court's analysis is to determine whether there is independent evidence to corroborate the statement. In effect, this analysis looks outside the statement to determine circumstantial guarantees of trustworthiness, while the first inquiry seeks to satisfy the same bench mark from within the statement.

Returning to the initial inquiry, the proffered statements are the grand jury testimony of the declarant and transcriptions of his interview by agents of the F.B.I. While the transcriptions are conceded to be correct transcripts of the declarant's statements, there is substantially more dispute over the truthfulness of the statements themselves.

Roger Underhill and defendant Thevis were partners in Cine-matics, Inc., a corporation which controlled much of the pornographic "peep shows" throughout the country. From the evidence, it appears that Underhill valued his interest at approximately $500,000, and that he believed that he was forced to sell that interest for $365,000, of which he eventually only received $140,000.

Underhill attributed this loss to defendant Thevis, as a result, the declarant filed a civil RICO action, 18 U.S.C. § 1964, in which he sought damages of $935,000 for the forced sale of his Cine-matics' interest as well as other wrongs which he imputed to his former partner. The damages claimed were later increased to $10,000,000 by amendment. At the time the statements were made by the declarant, the civil suit was pending, and thus, the statements could be construed as self-serving.

Nor did Mr. Underhill appear to have great respect for the truth when it did not serve his purposes. In 1970, while working for defendant Thevis at Peachtree News, he told officers investigating the Hanna murder a different story from that set forth in his grand jury and F.B.I. statement.[5] Similarly, in August, 1972, while employed by Global on a part-time basis, Underhill was subpoenaed by a federal gand jury investigating potential tax crimes committed by Thevis and his then wife. Upon being sworn, and after receiving immunity, Underhill promptly committed perjury if his later testimony in his deposition taken in the civil RICO action is believed.

In 1977, Underhill received immunity from prosecution under 18 U.S.C. § 6003; prior to agreeing to cooperate with the government, however, he bargained for what can be best characterized as a criminal's version of a letter to Santa Claus. Among the concessions that Underhill desired for his testimony were: plastic surgery, civil immunity for past acts, a ten percent reward from I.R.S. tax recoveries from defendant Thevis, priority over any federal tax lien for execution of his anticipated civil RICO judgment, new identity replete with military PX privileges and a new pickup truck.

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[5] Underhill evidently told still a third version of the Hanna murder to Gene Matthews, an investigator for the Fulton County District Attorney's Office.

Were Roger Underhill a witness, his credibility would have been attacked under Rule 609, for he possessed a long record of past criminal activity. Nor would the defense concede Underhill's mental competency; in 1975, an attorney representing him in the Louisville arson sought to plead an insanity defense on the ground that the declarant was incapable of cooperating with his attorney.[4]

While the Court acknowledges the darker nature of Underhill's character, it is unwilling, as the defendant urges, to hold as a matter of law that his statements are incredible. In fact, the Court finds that Underhill lied in regard to the Hanna investigation and committed perjury before the grand jury to aid his friend, partner, and benefactor—defendant Thevis.

The declarant's testimony in the grand jury was given after the absolution of immunity was conferred and the Court finds that Underhill had a strong motive to testify truthfully, since only untruthful testimony would have subjected him to criminal liability. Furthermore, the Court notes that at the time of the grand jury testimony and the F.B.I. interview, Underhill's civil RICO suit against defendant Thevis was then pending. The Court finds that the pending civil litigation gave further motive to the declarant to testify truthfully, since he was sufficiently familiar with the judicial process to realize that prior inconsistent statements could be used to impeach his credibility. Thus, to the extent that his testimony in the criminal RICO action was proved untruthful, it would be utilized to discredit his civil RICO testimony.

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[4] In his affidavit, J. Roger Thompson, Esq., stated that Roger Underhill had difficulty focusing his attention on the elements essential to the defense of the crime. Subsequently, Thompson testified that Underhill seemed to have a mental fixation on two different subjects: (1) the government's prosecution of him, and (2) Mike Thevis and his efforts to kill Underhill.

Finally, the statements themselves boost their own credibility. First, the statements were recorded and accurately transcribed; consequently, the traditional fear that the declarant's statement is garbled by the testifying witness is nonexistent. Secondly, the statements bespeak their own authenticity; each is replete with the detail to which only a participant and confidante would have access.

Prior to adoption of the Federal Rules of Evidence, Judge Weinstein states that "the admissibility of hearsay evidence was resolved by assessing relevancy, need and reliability instead of insisting on compliance with a particular class exception. The same approach should be used on proffers made pursuant to Rule 803(24)."[7] 4 *Weinstein's Evidence*, ¶ 803(24)[01], p. 803-247.

There is no question of the relevancy of the proffered statements, and the need for the testimony is self-evident.[8] As to the reliability possessed by the statements, the Court is convinced that four of the proffered statements possess circumstantial guarantees of trustworthiness equivalent to the other exceptions under Rule 804, and each will be considered separately, *infra*.

The grand jury statement was sworn testimony reported by a certified court reporter. The Court finds that it was Underhill's best interest to testify truthfully. Not only would untruthful testimony subject him to perjury charges, but it would also jeopardize the prospects of his civil RICO suit. To the extent that the grand jury statement was made without motive to

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[7] Although Judge Weinstein was discussing Rule 803(24), the same standards and evidentiary principles would be applicable to assessments under Rule 804(b)(5). 4 *Weinstein's Evidence*, ¶ 804(b)(5)[01], 804-102.

[8] Indeed, Underhill's murder makes the defense argument that Rule 804(b)(5) is to be limited to only "exceptional" cases largely academic. In fact, the Court is hardpressed to think of a more "exceptional" situation than that presented by the instant issue.

misstake the truth, it certainly approaches the circumstantial guarantees of trustworthiness contained in the dying declaration. *See*, Rule 804(b)(2). The Court reaches the same conclusion, in general, as to the F.B.I. interview. Although unsworn, the Court finds that the statement was made with motive to testify truthfully, and the vast detail provided in the statement vouches for its reliability.

Moreover, the Court notes that no agreement was ever consummated whereby the government would shield Underhill from civil liability for his past actions. Absent such an agreement, much of the proffered statements contain admissions against Underhill's pecuniary interest,[9] and to that extent the proffered statements certainly possess circumstantial guarantees of trustworthiness equivalent to that exception. Rule 804(b)(3).

Turning to the second part of the Court's analysis, the Court will review each proffer individually to determine if corroborating evidence enhances the circumstantial guarantees of trustworthiness.

THE HANNA MURDER

Succinctly, in the proffered statements, Underhill related how he was called at home by defendant Thevis on the morning of November 13, 1970. Arriving at the Thevis complex, Underhill was shown Hanna's car, and Thevis indicated that he had killed Hanna, the body of whom he had locked in the trunk. Underhill pulled the trunk lock, so that Thevis could retrieve the car keys; then, the declarant followed Thevis in Hanna's car to the

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[9] While the applicable Georgia statute of limitations would apparently bar any tort liability for Underhill's participation in either the Hanna or Mayes' murders, the Court is aware of no principle which would have barred Underhill's inclusion as a civil defendant in either the Louisville arson, the Fayetteville arson, or the Simpson Street insurance fraud at the time the proffered statements were made.

Atlanta airport where the car and victim were abandoned. The pair then returned to the office where Underhill melted the murder weapon, his tools, and certain coins from Hanna's body in a stainless steel pan. That evening, Underhill threw the pan with the melted remnants into the Chattahoochee River.

The statement is corroborated by Underhill's wife who testified that she remembered the telephone call on the morning of November 13, 1970. That the trunk lock was pulled was established by the photographs and investigating officers who found the automobile in the airport parking lot. Photographs of Hanna's body in the trunk verified Underhill's description of the body's position and the clothes on the body. A Mexican Centavo was found on Hanna's body. After the grand jury testimony and the F.B.I. interview, Underhill identified the place where he disposed of the pan and the melted gun. At that location, F.B.I. divers located a stainless steel pan in which was discovered two metal shanks, a molten "blob", and four Mexican Centavos.

Experts for both the government and the defense concede that the shanks are remnants of screwdrivers, one of which bears the initials R.D. The last initial is partially obscured, but all parties agree that the third initial is either a "U," "V," or "W".

Although the experts disagree over whether the metal "blob" could have originally been a revolver, the Court finds the presentation of the government's expert more thorough and convincing. The Court finds as a matter of fact for the purposes of this preliminary question that the trace elements contained in the metal "blob" are consistent with those expected to be found in a revolver which had been subjected to intense heat, melted with other metals, and then immersed in the Chattahoochee for several years.

Finally, the Court notes that Underhill's statement to defendant Thevis' admission as to his part in the Hanna

slaying is corroborated by defendant Thevis' statement to Leon Walters and by the defendant himself on the "shoemike" tapes.

Thus, the Court finds as a matter of law that the proffered Underhill statements as to the Hanna murder contain circumstantial guarantees of trustworthiness equivalent, at least, to the dying declaration. This reliability is manifested not only in the statement itself, but also by the corroborating evidence which substantiates Underhill's account in all material respects. The Court further finds that the statements are more probative than other evidence which the government could reasonably procure and that the admission of these statements serves the general purposes of the Federal Rules of Evidence in that admission of the proffer presents to the jury relevant, reliable, needed evidence which is necessary for the ascertainment of the truth and a just determination. Rule 102.

THE ANTHONY EXTORTION

In March, 1971, Joseph Anthony was severely beaten in Houston, Texas. The government alleges that the beating was administered by the enterprise to force Anthony to abandon a valuable pornographic distributorship which he held in that city.

Underhill's statement is proffered, but it is severely limited in scope. The declarant relates that defendant Thevis requested that he have Anthony beaten, but Underhill declined. Thereafter, Underhill reports that Robert Mitchum was hired to perform the act and that Anthony actually was beaten.

The difficulty with this proffer is that Underhill's knowledge as to the employment and execution of the Anthony beating is necessarily hearsay, for by his own admission he declined to participate. Since Underhill is not relating something that he did or saw, he is not a competent witness. Furthermore, the source of his knowl-

edge as to the crime is unidentified, and thus, the Court is unable to evaluate the competency of that unnamed declarant.

Nor is Underhill's statement corroborated by any evidence other than the fact that Joseph Anthony was beaten and that an enterprise subsidiary had recently lost a valued pornographic distributorship.

The Court finds as matter of fact that the proffered testimony as to the Anthony beating is almost entirely hearsay [10] and that it does not have circumstantial guarantees of trustworthiness equivalent to the other Rule 804 exceptions.

THE FAYETTEVILLE ARSON

The proffer concerning the Fayetteville arson is relatively simple. In 1972, Global had a bookstore, "Paris Books" with movie machines in Fayetteville, North Carolina. That particular location was overshadowed by a competitor, the "Village Bookstore." Underhill relates how he and defendant Thevis decided to burn out this competitor, and for that purpose they traveled to Fayetteville. The two visited the store, and then returned to Atlanta. Underhill then hired and instructed Mahar who actually performed the job; Underhill was not present at the time that Mahar burned the competitor, and his only knowledge of the actual arson comes from Mahar.

Underhill's statement is corroborated in part by independent evidence. Herman Womack testified that he owned the "Village Bookstore." Womack had a conversation with defendant Thevis in which the defendant claimed that Fayetteville was his town and that Womack would either have to sell the "Village Bookstore" or lose it. Subsequently, the offending bookstore burned, but the official investigation revealed no evidence of arson.

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[10] In effect, this proffered statement presents a double hearsay problem under Rule 806, since the actual proffer is hearsay under Rule 804(b)(5) containing more traditional hearsay within it.

Insofar as Underhill's statement concerns activities in which he participated or viewed, the proffered statement has circumstantial guarantees of trustworthiness equivalent, at the least, to the dying declaration, Rule 804(b)(2) or statements against interest. Rule 804(b)(3). However, the Court has more difficulty with the limited portion of the Underhill statements in which the declarant relates what Mahar told him about the arson. First, there is no corroboration of Mahar's statement to Underhill other than the building burned shortly after Womack and defendant Thevis had their business discussion. Secondly, the truth of the statement is a matter obviously beyond the scope of Underhill since by his own admission he was not present at the scene. Finally, the Court is aware that Mahar was an indicted coconspirator and upon the requisite showing under Rule 801(d)(2)(E), his statement could have been admitted against all other conspirators. Nonetheless, this particular coconspirator's statement is contained in a Rule 804(b)(5) statement, and absent clear corroborating evidence, the Court is reluctant to hold that the coconspirator's admission possesses the requisite circumstantial guarantees of trustworthiness to pass evidentiary muster. The Court finds no corroborating evidence as to Mahar's statement and holds that it is inadmissible under Rule 804(b)(5).

As to the remainder of this proffer, the Court notes that of three participants, defendant Thevis has the privilege against self-incrimination and Mahar is dead. Thus, the Underhill statements are the most probative evidence which the government could reasonably procure. Finally, the Court finds that admission of the limited portion of the proffers approved by the Court will serve the general purposes and policies underlying the Federal Rules of Evidence.

SIMPSON STREET MAIL FRAUD

In his statements, Underhill described how he and Mahar burned an abandoned house for defendant Thevis

by using gunpowder as an accelerant. The statements are limited to Underhill's personal participation, and they are corroborated by the fire marshall's investigation and the testimony of Leon Walters. The Court finds that the statements contain circumstantial guarantees of trustworthiness equivalent to either the dying declaration, Rule 804(b)(2) or the statement against pecuniary interest. Rule 804(b)(3). The admission of the proffered statements will serve the policies of the Federal Rules, and the statements are the most probative evidence which the government could reasonably procure.

THE MAYES MURDER

In the statements proffered by the government, Underhill states that Thevis initially approached him in December, 1972 to kill Jimmy Mayes, a former employee who was then making threats as to Thevis' life. Underhill was reluctant to personally perform the murder, so he recruited Mahar. To pay for the murder, Underhill received $3500 from Leon Walters.

On the night that Mahar and Michael Bryson killed Mayes by placing a plastic bomb in his van, Underhill related that he was at home. Upon receiving a call from Mahar that the deed had been performed, Underhill met Mahar and paid him $2500. The next day, according to the transcripts, Underhill collected small remnants of Mayes' shattered body which he showed to both Walters and Thevis.

Underhill's statements are corroborated in detail by the testimony of both Leon Walters and Michael Bryson, Mahar's confederate. In light of Bryson's corroborating testimony, the Court has no difficulty in holding that the proffered testimony contains circumstantial guarantees of trustworthiness equivalent to the other Rule 804 exceptions. As Underhill was the link between defendant Thevis and Mahar, the statements are the most probative statements which could reasonably be offered. Further-

more, admission of the statement certainly supports the policy and general purposes of the Federal Rules of Evidence as discussed earlier.

II

As noted earlier, a condition to admission under Rule 804(b)(5) is that admission of the proffered statement be "in the interests of justice." This requirement, of necessity, incorporates the Confrontation Clause of the Sixth Amendment. *United States v. Bailey*, *supra* at 350; *United States v. Love*, 592 F.2d 1022, 1027 (8th Cir. 1979) at 1027. Thus, the question is simply stated, but more difficultly answered: does admission of the proffered testimony violate the defendants' right to confrontation guaranteed by the Sixth Amendment.

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Taken literally, that constitutional guarantee would exclude every form of hearsay and hearsay exception, but as Judge Medina noted in *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), *cert. denied* 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1968):

> The application of this doctrine, like the principles relating to dying declarations, prior testimony of deceased witnesses, and indeed virtually all the exceptions to the hearsay rule, does not involve any deprivation of the right of confrontation as the Sixth Amendment has been interpreted and construed.

In *Dutton v. Evans*, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970), the Supreme Court recognized that "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots;" however, while they both are "designed to protect similar values, it is quite a different thing [entirely] to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification

of the rules of hearsay and their exceptions as they existed historically at common law." *California v. Greene*, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933-1934, 26 L.Ed.2d 489 (1969).

In *Mancusi v. Stubbs*, 408 U.S. 204, 213, 92 S.Ct. 2308, 2313, 33 L.Ed.2d 293 (1972), the Supreme Court set forth the standard for the evaluation of admissible evidence under a hearsay exception after a confrontation objection has been lodged:

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." *Dutton v. Evans*, *supra* [400 U.S.], at 89 [91 S.Ct. [210] at 220], 27 L.Ed.2d 213, and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Greene*, *supra*, 399 U.S. at 161 [90 S.Ct. [1930] at 1936]. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability" referred to in *Dutton*.

In *Medico*, *supra* at 319, n. 1, Judge Mansfield paraphrased Dean Wigmore in noting that "the foundation for all hearsay exceptions is circumstantial trustworthiness in the absence of cross-examination." In *Mancusi*, the Supreme Court stated that the Confrontation Clause was also directed at the indicia of reliability contained in the statement of the unexamined, unconfronted declarant.

Notwithstanding the Supreme Court's protestations in *California v. Greene*, *supra*, to the contrary, the net effect of the *Mancusi* holding is to incorporate and merge the hearsay rule with its attendant exceptions into the Confrontation Clause of the Sixth Amendment. The re-

sult of this merger is that otherwise admissible hearsay is subjected to still further constitutional scrutiny to determine if the proffered hearsay has sufficient "indicia of reliability" to avoid offending the Confrontation Clause of the Sixth Amendment.

Since the Supreme Court has yet to evaluate the *Mancusi* standard in the context of a proffer under Rule 803(24) or Rule 804(b)(5) to determine if the proffered statements will violate the right to confrontation if admitted, this Court does not feel constrained to apply that standard to the issue pending. The Court is hesitant to apply the *Mancusi* standard, because it perceives that the application of "the indicia of reliability" test, is in reality, no constitutional analysis whatsoever in a Rule 804(b)(5) context.

The Federal Rules of Evidence regulate the procedure of the taking and admission of evidence in federal courts. Under those rules, there are certain exclusionary rules which "facilitate the ascertainment of the facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead." *McCormick on Evidence*, § 72 (1972) (discussing exclusionary rules prior to adoption of Federal Rules of Evidence). Among those exclusionary rules are the opinion rule, Rule 701, the rule rejecting proof of bad character as evidence of a crime, Rule 404(b), the original writing rule, Rule 1001, and the hearsay rule, Rule 802. However, there are exceptions to those rules when the proffered evidence has badges of reliability which exempt it from the exclusionary rule's evidentiary prohibition. The chief example of those exceptions are, of course, the hearsay exceptions set forth in Rules 803 and 804.

With the exception of the two residual exceptions, Rules 803(24) and 804(b)(5), each of the class exceptions has been removed from the hearsay rule's exclusionary ban, because for each class exception judicial thought, analysis, and experience has determined that the evidence fall-

ing within that particular hearsay exception is reliable, competent evidence on which a verdict may be based.

The purpose of Rules 803(24) and Rule 804(b)(5) is simply to provide an evidentiary vehicle by which proffered hearsay statements which have "circumstantial guarantees of trustworthiness" equivalent to the other exceptions may be admitted into evidence. As two of the purposes underlying the Federal Rules of Evidence are that "the truth may be ascertained and proceedings justly determined," Rule 102, the residual hearsay exception in Rule 804(b)(5) would appear to be the embodiment of the purposes and policies underlying the federal evidentiary rules.

It is because the evidentiary requirements of Rule 804(b)(5) requires the proffered statement have "circumstantial guarantees of trustworthiness" and effectuate the policies underlying the federal rules, that this Court believes application of the *Mancusi* "indicia of reliability" standard inappropriate. By definition that constitutional standard is met prior to tender of the proffered Rule 804(b)(5) statement, and, thus, the actual constitutional analysis to determine if the Confrontation Clause is controverted is nothing more than an empty gesture. So that the Confrontation Clause will not be construed out of the Constitution by the application of the *Mancusi* standard in this context, the Court must reject it, for the Court perceives that right as a substantive right of trial procedure guaranteeing both presence and cross-examination of the accuser by the accused. *See, United States v. West*, 574 F.2d 1131, 1138 (4th Cir. 1978) (J. Widener dissenting).

The Supreme Court recognized the purpose of the Confrontation Clause in its often-quoted passage in *Mattox v. United States*, 156 U.S. 237, 242, 243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895):

> The primary object of the constitutional provision in question was to prevent depositions or ex parte

> affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

As previously discussed in Part I, both statements were made after Roger Underhill received immunity under 18 U.S.C. § 6003 and actively began cooperating with the government. As the defendants correctly contend the declarant was the chief architect of the government's case. To the extent his statements were critical to the preparation and return of the indictment, the pursuit of evidence, and other matters relating directly to the guilt or innocence of the accused, the statements are but one step removed from the *ex parte* affidavits and depositions which the Confrontation Clause was adopted to preclude. In light of the fact that the original indictment included four counts involving two different attempts to murder Underhill, the government would have been naive not to recognize the distinct possibility that a third attempt might succeed prior to trial. That the government recognized this possibility is established by the testimony of Mr. Harvey Harkness, Esq., the Assistant United States Attorney formerly assigned to the case, and Mr. Paul King, the case agent for the F.B.I.

Like the *ex parte* affidavit or deposition which the right to confrontation is directed against, the statements of Roger Underhill were taken by the prosecution for use in the pending criminal indictment against defendant Thevis. Although there is no evidence to suggest that either statement was actually taken for use at trial, the Court holds that the government was aware that a third attempt on the declarant's life might preclude live presen-

tation of his testimony. Since at the time the statements were made, Underhill was actively cooperating under a grant of immunity, and this conclusion is even stronger. Notwithstanding the "indicia of reliability" which the proffered statements possess, their use in this trial would bar the right confrontation secured by the Sixth Amendment since their use would be tantamount to prosecution by affidavit or deposition.

III

Because the Court holds the defendant's right to confrontation is vitiated by the admission of the proffered statements, the final preliminary question to be addressed is whether that right has been waived.

The last issue presents an issue of first impression. The government has proffered the Rule 804(b)(5) statements in its case as to the first two RICO counts. In Count X, defendants Fidelity,[11] Thevis and others are charged with conspiring to violate Roger Underhill's civil right to testify in this trial by murdering him. That count is properly joined with the two RICO counts, because the Underhill slaying is also a predicate act of racketeering in those counts. *United States v. DePalma*, 461 F.Supp. 778 (S.D.N.Y. 1978). Thus, before the Court can admit the proffered statements as to Counts I and II, it will have to find that the declarant is unavailable to testify because of acts of the defendants. Thus, the question presented to the Court is whether the defendants in Counts I and II waived their right of confrontation of Roger Underhill by causing him to become unavailable after learning that he would testify against them in this trial.

The right of confrontation is a substantive right of trial procedure personal to the accused. *See, Faretta v.*

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[11] Fidelity is the corporate parent of Global, both of whom with defendant Thevis are charged in Counts I and II.

California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As the Eighth Circuit recognized in *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976), *cert. denied* 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977):

> As such, this right, like other federally guaranteed constitutional rights, can be waived by the accused. *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); 5 J. Wigmore, *Evidence*, *supra* § 1398, at 142-143. To constitute a valid waiver there must be an 'intentional relinquishment or abandonment of a known right or privilege' by the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The defendant's right to confrontation may be impliedly waived by conduct which causes the declarant to become unavailable. In *Carlson*, *supra*, the declarant testified before the grand jury, but refused to testify at trial after he was threatened by the defendant. The government then offered the declarant's grand jury testimony under Rule 804(b)(5). The trial court admitted the testimony; after conviction the defendant appealed, arguing that his right to confrontation had been violated by the admission of the grand jury testimony. In upholding the conviction, in a persuasive and perceptive opinion, the Eighth Circuit held that no confrontation issue was preserved, because the defendant's conduct in causing the declarant to become unavailable operated as an implied waiver of his Sixth Amendment rights under the Confrontation Clause.

In following *Carlson*, this Court adopts no more than the principle that the defendant's right to confrontation may be impliedly waived by conduct which causes the declarant to become unavailable.

Defendant Thevis urges that the *Carlson* analysis is inapposite, for it rests on a finding that the defendant in that case caused the declarant to become unavailable. To make such a finding in this case, the defendant ar-

gues, would be to invade the province of the jury as to Count X. In making such an argument, the defendant misperceives the role of the Court in ruling on the admissibility of evidence.

As to Count X, it is the province of the jury to determine the guilt or innocence of the defendants, and if a verdict of guilty is returned the evidence must establish that guilt beyond a reasonable doubt. However, how the Court perceives the evidence as to Count X affects rulings on the admissibility of evidence as to Counts I and II, since the Court's perception of the facts of Count X are the predicate for ruling on the admissibility of the proffers in Counts I and II. In making this ruling on admissibility under Rule 104(a), the Court does not invade the province of the jury, for the guilt or innocence of the accused in Count X is still a question addressed solely to the jury.[12]

No court has yet to rule on the evidentiary standard to be applied when the question of whether the right to confrontation has been waived by conduct inimical to that right. Since the issue arises in the context of a ruling on the admissibility of evidence and not with the reliability of criminal jury verdict, the Court does not feel constrained to apply the "reasonable doubt" standard, *see, Lego v. Twomey*, 404 U.S. 477, 486, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972).

Waiver of other constitutional rights is generally measured by a preponderance of the evidence standard. *Lego v. Twomey, supra* (voluntariness of confession, waiver of Fifth Amendment rights); *United States v. Matlock*, 415

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[12] Indeed, because the Court has no intention or intruding intentionally or unintentionally into the jury's deliberations as to Count X, its announced ruling is limited to admissibility of the proffered evidence. The scope of the inquiry and the factual findings made by the Court to reach that ruling were not expressly enunciated until this opinion. To further protect the jury, this opinion shall be sealed until either a verdict is returned or mistrial declared.

U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (consensual search, waiver of Fourth Amendment rights). Notwithstanding the lesser standard approved by the Supreme Court in those constitutional waiver situations, this Court believes that a higher standard of proof is appropriate in this case.

Unlike the confession or consensual search cases where generally only the waiver of the right is inferred from the defendant's conduct, the waiver of the right to confrontation presents a situation where not only recognition of the right to confrontation is inferred from conduct, but the subsequent waiver of that right as well.

To validly waive a constitutional right, there must be an intelligent abandonment of that right. *Johnson v. Zerbst*, supra at 464, 58 S.Ct. 1019. "Intelligence" requires recognition of the constitutional right, while "abandonment" signifies conscious relinquishment. To comport with this requirement, the Court holds that the waiver of the right to confrontation by conduct causing the declarant to become unavailable must be established by clear and convincing evidence.

Applying that standard to the government's showing and the defense's *in camera* [13] presentation, it must first be acknowledged that there is no evidence in the record that Fidelity had any responsibility for the murder of Roger Underhill. Consequently, there can be no finding that either Fidelity or Global waived its right as an accused to confrontation.

As to defendant Thevis, the Court finds that the F.B.I. interview of Roger Underhill was released by the government to codefendants of Thevis in August, 1978. The transcribed interview details the scope of Underhill's expected testimony in this case, then pending against de-

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[13] The defense presented their evidence as to Count X *in camera*, so that the government would not have the period intervening this showing and the defense case to prepare their rebuttal.

fendant Thevis. Defendant Thevis had a copy of the Underhill transcript under his control at the time of his arrest on November 9, 1978. That copy contained over 140 Thevis fingerprints, and the Court finds that defendant Thevis had read the interview and was aware of its contents.

Prior to October 25, 1978, defendant Thevis conspired with Anna Jeanette Evans, Alton Bart Hood and others to kill Underhill to prevent his testimony in the trial of this case. Both individuals harbored defendant Thevis, and each aided in the establishment of new, false identities for Thevis.

At an earlier stage in the conspiracy, both Hood and Evans ordered the manufacture of silencers for pistols, and each inquired as to whether a 30.06 could be fitted with a silencer.

On October 24th, Bart Hood traced an automobile tag on a car owned by Underhill, using his contacts within the South Carolina highway department. The tag on Underhill's car was registered in another name. That same day, Jeanette Evans expressed interest in a piece of property owned by Underhill, a man with whom she had eschewed contact a year earlier. Evans was particularly interested in the location of the land and surrounding development.

On October 25, 1978, defendant Thevis and another individual were seen on the Underhill property approximately twenty minutes before Underhill and Issac Galanti were killed while walking over the declarant's land. Although both men were killed by twelve gauge shotgun wounds, a 30.06 rifle was also fired at the pair.

After October 25, 1978, defendant Thevis left Atlanta, and he did not return until after his apprehension on November 9th. Bart Hood returned to South Carolina on October 26th, and he subsequently reported the theft of a twelve gauge shotgun and 30.06 rifle from his car.

In summary, the Court finds clear and convincing evidence that defendant Thevis was aware that Roger Underhill would be a witness in the then-pending trial of this case. To prevent that testimony, defendant Thevis and others including defendants Hood and Evans conspired to murder Underhill, and on October 25, 1978, the objective of the conspiracy was successfully attained.

The Court holds as a matter of law that the declarant is unavailable because of defendant Thevis' action, and as a result of those actions, defendant Thevis waived his right to confrontation.

To further safeguard the defendant's constitutional rights, the Court will review this decision at the close of the case. If at the close of the defense's case, the evidence will not support the clear and convincing standard, the Court will enter an order striking the admitted statements and such other appropriate relief as is necessary.

Accordingly, the proffered statements of Underhill as to the Hanna murder, the Fayetteville arson as limited, *supra*, the Simpson Street Mail Fraud, and the Mayes murder are admitted against defendant Thevis under Rule 804(b)(5) subject to all evidentiary objections. This order shall remain sealed until a verdict is returned or a mistrial declared.

Opposition

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No. 81-2073

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL G. THEVIS AND GLOBAL INDUSTRIES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a criminal defendant who murders a prospective prosecution witness thereby waives hearsay objections to the admission of statements made by the witness out of court but found to be reliable.

2. Whether, after finding the murdered witness' statements admissible against petitioner Thevis, the district court committed reversible error by instructing the jurors, at Thevis' request, that they could not consider those statements as evidence against Thevis unless they first found him guilty of the murder.

3. Whether the district court's refusal to grant defense-witness immunity to petitioner Thevis' father violated the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2073

MICHAEL G. THEVIS AND GLOBAL INDUSTRIES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7a-66a) is reported at 665 F. 2d 616. The opinion of the district court on the evidentiary issue (Pet. App. 67a-94a) is reported at 84 F.R.D. 57.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1982. A petition for rehearing was denied on March 3, 1982 (Pet. App. 1a-6a). The petition for a writ of certiorari was filed on May 10, 1982, and is therefore out of time under Rule 20.1 of the Rules of this Court.[1]

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[1]Contrary to petitioners' suggestion (Pet. 2), Judge Kravitch's order staying issuance of the court of appeals' mandate until March 25, 1982, did not extend petitioners' time for filing their petition. See Sup. Ct. R. 20.4.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (count one), and of conspiring to commit that offense, in violation of another RICO provision, 18 U.S.C. 1962(d) (count two). In addition, petitioner Thevis was convicted of conspiring to violate a citizen's civil rights, in violation of 18 U.S.C. 241 (count ten), by murdering him. Petitioner Thevis was sentenced to two concurrent 20 year prison terms on the RICO counts and to a consecutive term of life imprisonment on the civil rights count. Petitioner Global Industries was fined $25,000 on each RICO count. The court of appeals affirmed (Pet. App. 7a-66a).

The evidence adduced at trial is detailed in the opinion of the court of appeals (Pet. App. 8a-15a). It established that petitioner Thevis headed an informal association of individuals and corporations that engaged in criminal activity to advance Thevis' interstate pornography business.

In the 1960's Thevis organized and controlled a group of corporations whose principal business was the distribution of "adult" books and films. In 1967, Roger Dean Underhill became Thevis' employee, and together they developed a profitable peep-show machine that was manufactured and distributed by two corporations controlled by Thevis (Pet. App. 9a). Petitioner Global Industries was the parent company of those firms (*id.* at 8a n.2).

On November 13, 1970, Thevis informed Underhill that he had shot Kenneth "Jap" Hanna, one of his competitors in the pornography business in Atlanta, Georgia. Thevis said that he had left the body in the trunk of Hanna's car but

had neglected to remove the car keys from Hanna's pocket. Thevis asked Underhill, a trained locksmith, to open the trunk to retrieve the keys. After Underhill performed this task, he and Thevis drove the car containing Hanna's body to the airport parking lot and left it there (Pet. App. 9a-10a).[2]

In December 1972, Thevis ordered Underhill to murder Jimmy Mayes, one of Thevis' employees, because Mayes had threatened to kill Thevis for taking away half of his shares in the peep-show corporations. At Thevis' instruction, Underhill hired Bill Mahar to commit the murder. Mahar killed Mayes by putting a pipe bomb in the trunk of his car. When Underhill showed Thevis a piece of bone and a gold pin found at the scene of the explosion, Thevis said that he planned to make the bone into a paperweight. The day after the murder, Thevis instructed his nephew to give Underhill money to pay Mahar (Pet. App. 10a-11a).

On September 19, 1972, at Thevis' direction, Underhill and Mahar burned down an adult bookstore located one block away from a similar store operated by Thevis in Fayetteville, North Carolina. Afterwards, Thevis gave Underhill $1,500 to pay Mahar (Pet. App. 11a). On April 27, 1976, again at Thevis' direction, Underhill and two others set fire to a warehouse located in Louisville, Kentucky, and owned by one of Thevis' competitors in the peep-show industry (*ibid.*).

In January 1977, Underhill began to cooperate with the government in its investigation of Thevis. He gave lengthy recorded statements to the FBI and testified before a federal grand jury. In June 1977, Underhill visited Thevis in federal

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[2]Underhill later melted down the keys, the trunk lock, a screwdriver, and some coins that had been found in Hanna's possession and dumped them in the Chattahoochee River. A government diver retrieved the melted objects (Pet. App. 10a).

prison and recorded their conversation with a shoe mike provided by the FBI. During this conversation, he informed Thevis of his interviews with the FBI and told him that he had passed a polygraph test (Pet. App. 12a).

On April 28, 1978, Thevis escaped from an Indiana jail where he had been confined during the trial of a civil case arising from the Louisville arson. Soon after his escape, he contacted co-defendants Jeanette Evans and Bart Hood, who assisted him in establishing several aliases. Thereafter, Hood and Evans requested their cousin to construct silencers for a .38 caliber pistol. Evans also inquired about a silencer for a 30.06 rifle. Hood normally kept a shotgun and a 30.06 rifle in the trunk of his car (Pet. App. 12a-13a).

On October 24, 1978, Evans went to the office of a real estate agent in Atlanta and inquired about an undeveloped tract of land in Atlanta that Underhill had placed on sale. Evans warned the real estate agent not to have anything to do with the Underhill property, explaining that Underhill was dangerous and was "involved with Michael Thevis' activities." On that same day, Hood attempted to run a license check on the car Underhill was driving (Pet. App. 13a).

The following day, Underhill was shot to death while showing his tract of land to Isaac N. Galanti. Galanti was also killed. Police and FBI agents found several shotgun shell casings and spent 30.06 shells at the scene. One eyewitness observed Thevis near the gate of Underhill's property at the time of the shootings, and another saw Thevis, Evans, and Hood together approximately 45 minutes later (Pet. App. 14a).

Thevis and Evans were arrested on November 9, 1978, in Bloomfield, Connecticut. A search of their car yielded firearms, $4[illegible]0 in cash, and jewelry worth more than one

million dollars. A search of a rental locker in South Windsor, Connecticut, disclosed a transcript of Underhill's interviews with the FBI. More than 100 of Thevis' fingerprints were found on the transcripts. While subsequently confined in federal prison, Thevis confessed to his cellmate that he had "assassinated" Underhill and his "bodyguard" with a shotgun (Pet. App. 14a-15a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners claim (Pet. 10-16) that the hearsay rule barred the admission of out-of-court statements made by a prospective government witness murdered before trial by petitioner Thevis. Petitioners' argument lacks merit.

Before Roger Dean Underhill was murdered, the government intended to call him as its principal witness in the RICO prosecution of petitioners. Following the murder, the government sought to introduce portions of Underhill's grand jury testimony and his interviews with FBI agents under Fed. R. Evid. 804(b)(5), which permits the admission of certain hearsay statements that do not fall within any of the exceptions specifically enumerated in the rules but have "equivalent circumstantial guarantees of trustworthiness." After the government introduced evidence establishing Thevis' responsibility for the murder, the court admitted portions of Underhill's out-of-court statements, finding that they satisfied that rule's requirements (Pet. App. 77a-84a). The court also held that admission of the statements did not violate Thevis' rights under the Confrontation Clause of the Sixth Amendment, because the government had introduced "clear and convincing" evidence establishing that Thevis had waived those rights by causing Underhill's death (*id.* at 84a-89a).

The court of appeals upheld the admission of Underhill's statements (Pet. App. 19a-32a) but ruled (*id.* at 26a) that it did not have to determine whether the evidence met the standards of reliability required by Rule 804(b)(5). Following the Tenth Circuit's approach in *United States* v. *Balano*, 618 F. 2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980), the court instead held (Pet. App. 26a-32a) that Thevis had waived any hearsay objection to those statements, as well as his rights under the Confrontation Clause, when he murdered Underhill. The court added, however, that even when a defendant murders a prospective witness against him, the witness' prior out-of-court statements must be excluded, under Fed. R. Evid. 403 or the Due Process Clause, unless the trial judge finds them to be reliable (Pet. App. 33a n.17).

Petitioners argue (Pet. 12-16) that the decision of the court of appeals overlooked critical distinctions between the hearsay rule and the Confrontation Clause. Petitioners' argument is based upon a faulty premise and is illogical. Petitioners assert (Pet. 14) that "[t]he values protected [by the hearsay rule and the Confrontation Clause] are * * * quite different." However, as recently as *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (citations omitted), this Court reiterated that " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values' * * * and 'stem from the same roots'."

Moreover, the issue here is not the *scope* of the protection afforded by the hearsay rule and the Confrontation Clause but whether particular conduct—murdering a prospective witness to silence him—is sufficient to constitute a waiver of rights. Petitioners do not quarrel with the holding that the murder of Underhill waived their rights under the Confron-

tation Clause[3] but they contend that their rights under the hearsay rule were not waived. This argument—that the standard for waiving hearsay objections is stricter than the standard for waiving constitutional rights—is anomalous indeed, and petitioners cite no authority to support it.

Petitioners' reliance (Pet. 10-11) upon *United States* v. *Carlson*, 547 F. 2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977), is misplaced. There, the defendant had made a witness unavailable through intimidation. In upholding the admission at trial of the witness' grand jury testimony, the court applied the same analysis as the district court did in this case. The court held that the witness' grand jury testimony satisfied the requirements of Rule 804(b)(5) and that the defendant had waived his Sixth Amendment confrontation rights by deliberately making the witness unavailable. The court did not address the question whether the defendant's conduct also constituted a waiver of hearsay objections. Accordingly, *Carlson* does not conflict with the decision here.

In this case, the court of appeals acknowledged that the Confrontation Clause and the hearsay rule "are not coterminous" (Pet. App. 31a), but the court correctly concluded (*id.* at 32a & n.17) that a defendant waives his rights under both provisions where the government establishes by clear and convincing proof, first, that the defendant caused the witness' unavailability and, second, that the defendant did so in order to prevent the witness from testifying at trial. See *United States* v. *Balano, supra*, 618 F. 2d at 629. The court then added (Pet. App. 33a n.17) that even when this two-

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[3]Petitioners concede (Pet. 15) that "[t]he personal right of a defendant to confront his accuser is waivable by knowing conduct which makes it obviously impossible." Clearly, murdering a witness to silence him would constitute such a waiver.

part test is met, "the trial court should scrutinize the proffered statements to ensure that the evidence is not unreliable" and that its admission would not consequently offend either due process or Fed. R. Evid. 403. Finding that "in this case * * * sufficient indicia of reliability existed to avoid rule 403 or due process problems" and that Underhill's statements were corroborated by other evidence (Pet. App. 33a n.17), the court concluded that those statements had been properly admitted.

The rule adopted by the court of appeals serves the salutary purpose of precluding a defendant from profiting by intentional misconduct designed to subvert the legal process. At the same time, that rule prevents convictions based upon unreliable evidence. On the other hand, the rule advocated by the petitioners would make a mockery of the judicial process by permitting a defendant who made a witness unavailable by murder, intimidation or other means to rely upon the witness' absence to block the admission of his reliable out-of-court statements.

2. After admitting Underhill's extrajudicial statements on the grounds noted above, the district court instructed the jurors at the conclusion of the trial that they should not consider those statements as evidence of Thevis' guilt under the RICO counts (counts one and two) unless they first found Thevis guilty of the Underhill-Galanti murders (count ten). Petitioners contend (Pet. 16-21) that this instruction incorrectly left the question of the admissibility of hearsay evidence in the hands of the jury and that it created an improper incentive for the jury to convict petitioner Thevis on the murder count. As the court of appeals held (Pet. App. 62a-63a), however, petitioners' claim fails for the simple reason that Thevis himself requested the instruction. He undoubtedly did so because it gave him a second chance to avoid the impact of evidence previously held to be admissible by the court and because it required

the jury to apply a more stringent standard of proof on that issue than the "clear and convincing" standard employed by the court. See *United States* v. *Enright*, 579 F. 2d 980, 986-987 (6th Cir. 1978).

3. Before and during trial, petitioners requested that the district court grant use immunity to George Thevis, petitioner Thevis' father. According to an *ex parte* defense proffer made *in camera*, George Thevis, if immunized, would have testified that his son and Hood were with him at a motel when Underhill and Galanti were murdered. The district court held that it had no authority to grant such immunity, and the court of appeals agreed (Pet. App. 46a-50a). Relying on *Government of the Virgin Islands* v. *Smith*, 615 F. 2d 964 (3d Cir. 1980), petitioners contend (Pet. 22-25) that this ruling violated their due process rights. Their argument is insubstantial.

The courts of appeals have consistently and correctly held that, except perhaps in extraordinary circumstances absent here, a criminal defendant is not entitled to immunity for potential defense witnesses. See, *e.g.*, *United States* v. *Chagra*, 669 F. 2d 241, 258-259 (5th Cir. 1982); *United States* v. *Turkish*, 623 F. 2d 769, 771-774 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F. 2d 960, 963-964 (6th Cir. 1980); *United States* v. *Gleason*, 616 F. 2d 2, 27-28 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *United States* v. *Klauber*, 611 F. 2d 512, 517 & n.11 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Herman*, 589 F. 2d 1191, 1200 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979); *United States* v. *Lang*, 589 F. 2d 92, 95-97 (2d Cir. 1978); *United States* v. *Rocco*, 587 F. 2d 144, 146-148 (3d Cir. 1978); *United States* v. *Carman*, 577 F. 2d 556, 561 (9th Cir. 1978); *United States* v. *Benveniste*, 564 F. 2d 335, 339 n.4 (9th Cir. 1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F. 2d 1302,

1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F. 2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Smith*, 436 F. 2d 787, 790 (5th Cir.), cert. denied, 402 U.S. 976 (1971); *Earl* v. *United States*, 361 F. 2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967) (transactional immunity).

Government of the Virgin Islands v. *Smith, supra*, upon which petitioners rely (Pet. 22-23), involved exceptional circumstances not present in this case. In *Smith*, a potential defense witness invoked his Fifth Amendment privilege and refused to testify in the defendant's behalf. The local prosecutor, who alone had authority to prosecute the defendant and the witness (both of whom were juveniles), agreed to grant immunity to the witness. Apparently as a courtesy, the prosecutor requested the consent of the United States Attorney. For unexplained reasons, the United States Attorney did not concur in the grant of immunity, immunity was withheld, and the witness therefore refused to testify (615 F. 2d at 967).

Faced with these exceptional circumstances, the court of appeals held that the defendant had demonstrated a *prima facie* claim to immunity for the prospective defense witness, and it therefore remanded the case to the district court for further proceedings. Central to this holding was the court's conclusion that, because the United States Attorney had no jurisdiction with respect to the defendant or the witness, there was no perceptible governmental interest in withholding consent to the immunity grant (see 615 F. 2d at 974). The Second Circuit has correctly characterized *Smith* as involving a "totally bizarre situation" and an "extraordinary fact situation * * * [in which] the public interest in not granting defense witness immunity appears to be nonexistent" (*United States* v. *Turkish, supra*, 623 F. 2d at 773, 777).

The alternative holding in *Smith*—that the court may order defense-witness immunity to remedy "prosecutorial misconduct" undertaken " 'with the deliberate intention of distorting the judicial factfinding process' " (615 F. 2d at 968, quoting *United States* v. *Herman, supra,* 589 F. 2d at 1204)—also has no application in the instant case. See also *United States* v. *Morrison,* 535 F. 2d 223 (3d Cir. 1976); *Earl* v. *United States, supra,* 361 F. 2d at 534 n.1. Here, the court of appeals expressly found that "no [such] abuse occurred in the prosecution of Michael Thevis" (Pet. App. 49a), and petitioners do not now base their argument upon a claim of prosecutorial misconduct. Nor does this case involve any other exceptional circumstances that might justify a grant of judicially-created testimonial immunity.

In sum, there is no reason to conclude either that *Smith* signals a departure from the unanimous position of the courts of appeals or that the Third Circuit would disagree with the decision below on the facts of this case. Indeed, in the subsequent case of *United States* v. *Lowell,* 649 F. 2d 950, 965 (1981), the Third Circuit read *Smith* to apply only where the trial court is faced with the "probable certainty" that the witness' testimony would exonerate the defendant. In view of the eyewitness testimony placing Thevis at the scene of the crime and his confession to his cellmate, no such "probable certainty" existed here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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